PRINCIPLES

OF

HINDU LAW

BY

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TENTH EDITION

BY

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TO THE MEMORY

OF

THE LATE SIR BASIL SCOTT, KT.,

FORMERLY CHIEF JUSTICE

OF

THE HIGH COURT OF JUDICATURE AT BOMBAY.

PREFACE TO THE TENTH EDITION.

In the preparation of this edition, the editor has attempted to state the law as modified or supplemented by the decisions extending over a period of seven years. The most important of these are those relating to the Hindu Law of Inheritance (Amendment) Act, 1929, and the Hindu Women's Right to Property Act, 1938.

Under the former Act the question whether a half-sister was included in the term "sister" was at first the subject of conflicting decisions until Full Bench decisions settled the conflict in the particular High Courts. However, the Privy Council finally settled the matter in *P. M. Karuppayammal* v. *Meenammal* (1943) Mad. 235, holding that the half-sister is also an heir under the Act but is postponed to a full-sister. In another case the Judicial Committee (*Mt. Sahodra* v. *Ram Babu* (1942) 69 I.A. 145) held that the Act applied even to Provinces where the sister and others were not formerly heirs.

The Hindu Women's Right to Property Act, 1938, has been held by the Federal Court to be *ultra vires* as to agricultural property. There are other important decisions on the Act though some of them require further consideration.

The law relating to Bandhu Succession continues to give rise to conflicting decisions. The Bombay High Court agrees with the Allahabad High Court and differs from the Madras High Court in the interpretation of *Ramchandra* v. *Vinayak*. The Madras High Court in a Full Bench decision affirmed its former decision that the Bandhuship is not confined to four families and to four kinds of descendants as held by the Allahabad High Court.

The law relating to accumulations by a widow has received further development by recent decisions of the Privy Council and it was found necessary to effect alterations in the text.

The decision in *Har Naraini Kunwar* v. *Sajjan Pal Singh* (1940) All. 719, is important. It applies an earlier decision of the Board, *Amrit Narayana Singh* v. *Gaya Singh* (1918) 45 Cal. 590, which by inadvertence was omitted in the former editions of this work.

The law relating to adoption followed by divesting of property has given us another important decision of the Judicial Committee *Ananta Bhikkappa* v. *Shanker Ramachandra* (1943) 70 I.A. 232 and several decisions in Bombay and Nagpur.

The rights of illegitimate sons of a junior member to maintenance out of an impartible estate is the subject of a decision by the Privy Council in *Raja Velugoti Kumar Krishna Bahadur* v. *Rajendra Rao* (1942) Mad. 419.

The provisions of the Hindu Married Women's Right to Maintenance Act, 1946, have been incorporated in the text.

The delay in bringing out this edition for which there is urgent need is partly due to war conditions and I have been asked to express regret that it has become necessary to raise the price of the book owing to the high cost of production.

The editor desires to record his grateful appreciation of the assistance rendered to him by Mr. Vepa P. Sarathi, Advocate, Madras High Court, and Mr. J. C. Bhat, Advocate, Bombay High Court.

V. R.

June 1946.

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PRINCIPLES OF HINDU LAW.

CHAPTER I.

OPERATION OF THE HINDU LAW.

1. Castes.—(*1*) The Hindus are divided into four castes (*a*), namely— S. 1

(1) the Brahmans, or priestly caste;

(2) the Kshatriyas, or warrior caste;

(3) the Vaisyas, or agricultural caste; and

(4) the Sudras.

Each of these castes is divided into a number of sub-castes.

(*2*) The members of the first three castes are called twice-born or regenerate. The second birth or regeneration consists in the study of the Vedas or sacred literature and in the performance of *samskaras* or sacraments. All these are denied to Sudras except the *samskara* of marriage (*b*).

The above classification is very important. In cases of adoption the adopted son must belong to the same caste as the adoptive father. In cases of marriage, according to one view, the parties to the marriage must both belong to the same caste. As regards Sudras it may be observed that there are several rules of Hindu law which do not apply to them, especially those rules which are closely connected with rites and ceremonies, such as the performance of *datta homam* (oblation to fire) in the adoption ceremony.

Kayasthas.—It has been held by the High Court of Calcutta that Kayasthas as a general rule are Sudras (*c*). On the other hand, it has been held by the High Courts of Allahabad (*d*) and Patna (*e*), that they are not Sudras, but belong to one of the three regenerate classes, probably Kshatriyas.

Marathas.—There are three classes of Marathas in the Bombay Presidency, namely, (1) the five families, (2) the ninety-six families, and (3) the rest. Of these the first two classes are Kshatriyas, and the last Sudras (*f*).

Vaidyas.—The Vaidyas of Bengal are Sudras (*g*). The Tanjore branch of the Marathas descended from Shivaji belongs to the Sudra and not to the Kshatriya caste (*h*). The Madura Ramayana Chavadi Thousand Yadavas residing chiefly in Madura and adjoining villages are Sudras (*i*).

(*a*) *Chuoturya* v. *Sahub* (1857) 7 M. I. A. 18, 4 W. R. 132.

(*b*) See Banerjee on Marriage and Stridhana, 5th ed., pp. 31, 37.

(*c*) *Raj Coomar Lall* v. *Bissessur Dyall* (1884) 10 Cal. 688; *Asita Mohan* v. *Nirode Mohan* (1916) 20 C. W. N. 901, 35 I. C. 127, ('17) A. C. 292, on appeal (1920) 47 I. A. 140, 145, 24 C. W. N. 794, 798, ('20) A.P.C. 129; *Bhola Nath* v. *Emperor* (1924) 51 Cal. 488, 81 I. C. 709, ('24) A. C. 613; *Rajnandin* v. *Aswini Kumar* ('41) 1 Cal. 437, ('41) A. C. 20.

(*d*) *Tulsi Ram* v. *Bihari Lal* (1890) 12 All. 328, 334.

(*e*) *Ishwari Prashad* v. *Rai Hari Prashad* (1927) 6 Pat. 506, 106 I. C. 620, ('27) A. P. 145.

(*f*) *Subrao* v. *Radha* (1928) 52 Bom. 497, 113 I. C. 497, ('28) A. B. 295.

(*g*) ('41) 1 Cal. 437 noted under n. (*c*) *supra*.

(*h*) *Maharaja of Kolhapur* v. *Sundaram* (1925) 48 Mad. 1, 93 I. C. 705, ('25) A.M. 497

(*i*) *Mookka Kone* v. *Ammakutti Ammal* (1928) 51 Mad. 1 (F.B.) ('28) A.M. 299.

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2. Application of Hindu Law.—The power of the Courts of British India to apply the Hindu law to Hindus is derived from and regulated by statutes of Parliament and by imperial and provincial legislation [sec. 5].

3. Extent of application of Hindu Law.—(*1*) The Hindu law as administered by the Courts of British India is applied to Hindus in some matters only.

(*2*) Throughout British India questions regarding succession, inheritance, marriage, and religious usages and institutions, are decided according to Hindu law, except in so far as such law has been altered by legislative enactment.

(*3*) Besides the matters above referred to, there are certain additional matters in which the Hindu law is applied to Hindus, in some cases by virtue of express legislation, and in others on the principle of justice, equity and good conscience. These matters are adoption, guardianship, family relations, wills, gifts and partitions. As to these matters also the Hindu law is to be applied subject to such alterations as have been made by legislative enactment.

See the note to the texts at the beginning of Chapter II.

4. Acts modifying Hindu Law.—The Hindu law has been modified and supplemented in certain respects by the following Acts :—

(*i*) *The Caste Disabilities Removal Act*, 1850.—According to the Hindu law and usage, if a Hindu renounces his religion, or is excluded from the communion of that religion, or is deprived of caste, such renunciation, exclusion or deprivation entails a forfeiture of his rights and property, and deprives him of his right of inheritance. The effect of the above-mentioned Act was that these consequences ceased to be enforced as law in the Courts of British India (*j*). The Act is also known as the Freedom of Religion Act.

(*ii*) *The Hindu Widows' Remarriage Act*, 1856.—This Act legalizes the remarriage of Hindu widows in certain cases.

(*j*) *Khunni Lal* v. *Gobind Krishna* (1911) 33 All. 356, 38 I. A. 87, 10 I. C. 477. See also *Chedambaram* v. *Ma Nyein Me* (1928) 6 Rang. 243, 111 I.C. 2, ('28) A. R. 179.

(*iii*) *The Indian Succession Act*, 1925, *ss.* 57, 214, *and Schedule III to the Act.*—These sections are dealt with in the chapter on Wills.

(*iv*) *The Native Converts' Marriage Dissolution Act*, 1866.—This Act enables a Hindu convert to Christianity to obtain a dissolution of marriage under certain circumstances.

(*iva*) *The Special Marriage Act of* 1872 (after amendment of 1923).

(*v*) *The Transfer of Property Act IV*, 1882, *as amended by Act XX of* 1929.—This Act supersedes the whole of the Hindu law as to transfer of property, excepting certain matters referred to in sec. 129 of the Act.

(*vi*) *The Indian Majority Act*, 1875.—This Act, which fixes the age of majority on completion of the eighteenth year, applies to Hindus, except in matters of marriage, divorce and adoption.

(*vii*) *The Guardians and Wards Act*, 1890.—This Act applies to Hindus in cases where a guardian has to be, or has been, appointed by the Court.

(*viii*) *The Hindu Inheritance (Removal of Disabilities) Act*, 1928.—This Act limits the disabilities which excluded a Hindu from inheritance and from a share on partition.

(*ix*) *The Hindu Law of Inheritance (Amendment) Act*, 1929.—This Act admits the son's daughter, the daughter's daughter, the sister, and the sister's son, as heirs next after the father's father and before the father's brother.

(*x*) *The Transfer of Property (Amendment) Supplementary Act XXI of* 1929.—This Act amends the Madras Acts of 1914 and 1921, and the Hindu Disposition of Property Act, 1916, which relate to transfers and bequests in favour of unborn persons.

(*xi*) *The Hindu Gains of Learning Act*, 1930.—This Act makes all acquisitions by means of learning the separate property of the acquirer.

(*xii*) *The Hindu Women's Rights to Property Act XVIII of* 1937.—This Act, which came into force on the 14th April 1937, gives new rights of inheritance to widows, and strikes at the root of a Mitakshara coparcenary.

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The following Acts may also be noticed here :—

The Indian Contract Act, 1872.—The Hindu law of contracts has been superseded by the Indian Contract Act, 1872 (*k*). But the rule of *damdupat,* by which interest exceeding the amount of principal cannot be recovered at any one time, has not been abolished by the Indian Contract Act or any other Act. That Rule is applied in the Bombay Presidency but not in the Madras Presidency. In the Bengal Presidency, it applies only to the Presidency town of Calcutta. See Chapter XXVIII, "The Law of Damdupat."

The Indian Evidence Act, 1872.—This Act supersedes the rules of the Hindu law of evidence.

The Indian Penal Code.—This Act supersedes the whole of the Hindu Criminal Law.

5. Enactments referred to in section 2.—The following is a statement in a tabular form of the enactments referred to in section 2 above, the Courts to which they apply, and the extent to which the Hindu law is to be administered by those Courts :—

Courts.	Enactments.	Extent.
1. High Courts of Calcutta, Madras and Bombay in the exercise of their original civil jurisdiction.	The Government of India Act, s. 112 [5 and 6, Geo. 5, c. 61]. See sec. 223 of the Government of India Act, 1935 [26 Geo. v.c. 2].	"Matters of inheritance and succession to lands, rents and goods, and matters of contract and dealing between party and party."
2. Presidency Small Cause Courts.	The Presidency Small Cause Courts Act, 1882, s. 16.	[The law to be administered by the Presidency Small Cause Court in each Presidency is the same as that administered by the High Court of that Presidency in the exercise of its ordinary original civil jurisdiction.]
3. Bengal, United Provinces and Assam Provincial Civil Courts.	The Bengal, Agra and Assam Civil Courts Act, 1887, s. 37.	"Succession, inheritance, marriage, caste, or any religious usage or institution."
4. Bombay Provincial Civil Courts.	Bombay Regulation IV of 1827, s. 26.	[This Regulation does not specify any particular extent.]
5. Madras Provincial Civil Courts.	The Madras Civil Courts Act, 1873, s. 16.	"Succession, inheritance, marriage, caste, or any religious usage or institution."
6. Civil Courts in the Punjab.	The Punjab Laws Act, 1872, s. 5.	"Succession, special property of females, betrothal, marriage, divorce, dower, adoption, guardianship, minority, bastardy, family relations, wills, legacies, gifts, partitions, or any religious usage or institution."
7. Civil Courts in Oudh.	The Oudh Laws Act, 1878, s. 3.	Do. do. do.
8. Civil Courts in Ajmere & Merwara.	The Ajmere Courts Regulation, 1877, s. 4.	Do. do. do.

(*k*) *Madhub Chunder* v. *Raj Coomar* (1875) 14 Beng. L. R. 76.

Courts.	Enactments.	Extent.
9. Civil Courts in Central Provinces.	The Central Provinces Laws Act, 1875, s. 5.	[As in the Punjab Laws Act, except that "divorce" is not included.]
10. Civil Courts in Burma.	The Burma Laws Act, 1898, s. 13.	"Succession, inheritance, marriage, or any religious usage or institution."

Though there is no specific reference to marriage or to religious institutions in enactment No. 1, the High Courts have dealt with questions relating to marriage and religious institutions according to Hindu law (*l*).

A Civil Court has no jurisdiction to try caste questions, unless the suit is in respect of a right to property or to an office. See the Code of Civil Procedure, 1908, s. 9, and Bombay Regulation II of 1827, s. 21.

The only enactment which mentions the Hindu law of contracts is enactment No. 1 which relates to High Courts. See notes to sec. 4, "The Indian Contract Act, 1872."

6. Persons governed by Hindu Law.—The Hindu law applies—

(*i*) not only to Hindus by birth, but also to Hindus by religion, *i.e.*, converts to Hinduism (*m*).

In a case before the Privy Council, a Hindu of the Kshatriya caste had an illegitimate son *J.B.* by a Mahomedan woman. *J.B.* was brought up as a Hindu, and he was throughout his life a follower of the popular idolatrous form of Hinduism. *J.B.* married a Hindu woman of the Kshatriya caste, and he had a son *B.G.* by her. One of the points raised in the case was that *B.G.* could not be considered a Hindu, as his father *J.B.* was a Hindu by religion only, and not by birth. Their Lordships, after noticing the arguments advanced on the point, said that in the view which they took of the case it was unnecessary to express any opinion on that point (*n*).

In a later case before the Privy Council, Lord Shaw, in delivering the judgment of the Board, said in effect that the expression "Hindu" in the Indian Succession Act included a convert to Hinduism (*o*).

See sec. 7 (4).

(*ii*) to illegitimate children where both parents are Hindus (*p*);

(*l*) *In re Kahandas Narandas* (1881) 5 Bom. 154, 167-170.

(*m*) *Abraham* v. *Abraham* (1863) 9 M. I. A. 199, 243; *Jowala* v. *Dharam* (1866) 10 M.I.A. 511, 537; *Dagree* v. *Pacotti* (1895) 19 Bom. 783, 788; *In re Joseph Vadiar of Nazareth* (1872) 7 Mad. H.C. 121, *Morarji* v. *Administrator-General* (1929) 52 Mad. 160, 111 I. C. 364, ('28) A. M. 1279; *Shedeo Narain* v. *Kusum Kumari* (1922) 50 I. A. 58, 2 Pat. 230, 71 I. C. 769, ('23) A. PC. 21; *Palaniappa Chetty* v. *Alagan Chetty* (1921) 48 I. A. 539, 44 Mad. 740, 64 I. C 439, ('22) A. PC. 228, *Ganesh Mahto* v. *Shib Charan Mahto* (1932) 11 Patna 139, 133 I. C. 165, ('31) A. P. 305 following (1928) 51 Mad. 1 (F. B.), 108 I. C. 760, ('28) A. M. 299.

(*n*) *Bhaiya Sher Bahadur* v. *Ganga Baksh* (1913) 36 All. 101, 115-116, 41 I. A. 1, 14, 22 I. C. 293.

(*o*) *Kamawati* v. *Digbijai* (1921) 43 All. 525, 533, 48 I. A. 381, 385, 64 I. C. 559, ('22) A. PC. 14.

(*p*) See *Ram Kumari, in the matter of* (1891) 18 Cal. 264; *Dattatraya Tatya* v. *Matha Bala* (1934) 58 Bom. 119, 149 I. C. 821, ('34) A. B. 36.

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(*iii*) to illegitimate children where the father is a Christian and the mother a Hindu, and the children are brought up as Hindus. But the Hindu law of coparcenary, which contemplates the father as the head of the family and the sons as coparceners by birth with rights of survivorship, cannot from the very nature of the case apply to such children (*q*);

(*iv*) to Jains (*r*), Sikhs (*s*), and Nambudri Brahmans (*t*) except so far as such law is varied by custom and to Lingayats who are considered Sudras (*u*);

(*v*) to a Hindu by birth who, having renounced Hinduism, has reverted to it after performing the religious rites of expiation and repentance (*v*). Or even without a formal ritual of reconversion when he was recognised as a Hindu by his community (*w*);

(*vi*) to sons of Hindu dancing girls of the Naik caste converted to Mahomedanism, where the sons are taken into the family of the Hindu grand-parents and are brought up as Hindus (*x*);

(*vii*) to Brahmos (*y*) and to Arya Samajists (*z*);

(*viii*) to Hindus who made a declaration that they were not Hindus for the purpose of the Special Marriage Act, 1872 (*a*).

Explanation.—A person who is born a Hindu and has not renounced the Hindu religion, does not cease to be a Hindu merely because he departs from the standard of

(*q*) *Myna Boyee* v. *Ootaram* (1861) 8 M. I. A. 400.

(*r*) *Sheo Singh* v. *Dakho* (1878) 1 All. 688, 5 I. A. 87 (adoption); *Chotay Lall* v. *Chunno Lall* (1878) 4 Cal. 744, 6 I.A. 15 (inheritance); *Sheokuarbai* v. *Jeoraj* (1920) 25 C. W. N. 273, 275, 61 I.C. 481 [P. C.]; *Rupchand* v. *Jambu Pershad* (1910) 37 I.A. 93, 6 I.C. 272 (adoption); *Bhagwandas* v. *Rajmal* (1873) 10 Bom. H. C. 241, p. 247 (adoption); *Thackersey* v. *Hurbhun* (1884) 8 Bom. 432, p. 458 (Jain temple); *Parshottam* v. *Venichand* (1921) 45 Bom. 754, 757, 61 I.C. 492, ('21) A. B. 147 [adoption]; *Gettappa* v. *Eramma* (1927) 50 Mad. 228, 99 I.C. 503, ('27) A. M. 228 [adoption]; *Bhikabai* v. *Manilal* (1930) 54 Bom. 780, 128 I. C. 628, ('30) A. B. 517 [alienation by Jain widow]; *Jaiwanti* v. *Anandi Devi* (1938) 59 All. 196, 173 I.C. 356, ('38) A.A. 62; *Suganchand* v. *Mangibai* ('42) Bom. 467, 44 Bom. L. R. 358, 20 I.C. 759, ('42) A. B. 185.

(*s*) *Rani Bhagwan Koer* v. *Bose* (1903) 31 Cal. 11, 30 I.A. 249; *Indir Singh* v. *Sadhan Singh* (1944) 1 Cal. 233

(*t*) *Vishnu* v. *Akkammu* (1911) 34 Mad. 496, 6 I. C. 583; *Narayan Iyer* v. *Moorthi Kenden* (1938) Mad. 897, ('38) A.M. 643.

(*u*) *Trikangauda* v. *Shivappa* (1943) Bom. 706, 45 Bom. L. R. 992, ('44) A.B. 40.

(*v*) *Kusum* v. *Satya* (1903) 30 Cal. 999.

(*w*) *Durga Prasada Rao* v. *Sudarsanaswami* ('40) A.M. 513.

(*x*) *Ram Pergash* v. *Mussammat Dahan Bibi* (1924) 3 Pat. 152, 78 I.C. 749, ('24) A. P. 420.

(*y*) *In the goods of Gnanendranath Roy* 49 Cal. 1069.

(*z*) *Mst. Suraj* v. *Attar* (1922) 1 Pat. 706, 713-714, 67 I. C. 550, ('22) A.P. 378.

(*a*) *Vidyagavri* v. *Narandas* ('28) A.B. 74; *Punyabratadas* v. *Monmohan Ray* ('34) A.P. 427; *Thukrubai* v. *Attuvar* (1935) 58 Mad. 1004, ('35) A. M. 653.

orthodoxy in matters of diet and ceremonial observances (*b*). The acceptance of the "Granth Sahib" by the Udassis (a Schismatic sect of Sikhs who remained within the fold of Hinduism) is no way inconsistent with their continuing Hindus (*c*). A Hindu does not by becoming a Jati Vaishnava (a sect in Bengal not recognising the caste system) cease to be a Hindu (*d*). **Ss. 6, 7**

7. Persons to whom Hindu Law does not apply.—The Hindu law does not apply—

(*1*) to the illegitimate children of a Hindu father by a Christian mother who are brought up as Christians (*e*), or to illegitimate children of a Hindu father by a Mahomedan mother (*f*);

These are not Hindus either by birth or by religion.

In s. 6, cls. (*ii*) and (*iii*), the mother is a Hindu, but not so here.

(*2*) to the Hindu converts to Christianity. Succession to the estate of a Hindu convert to Christianity who dies a Christian and intestate is governed by the Indian Succession Act, 1865, now Indian Succession Act, 1925. A person ceasing to be a Hindu in religion cannot since the passing of the Act of 1865 elect to continue to be bound by the Hindu law in the matter of succession (*g*);

Native Christians.—In cases before the Indian Succession Act, 1865, it was held by the Judicial Committee of the Privy Council that a Hindu convert to Christianity may, if he thinks fit, continue to be bound by Hindu law, although he has renounced the Hindu religion (*h*), but these decisions are no longer good law. See the Indian Succession Act, 1925, s. 58.

It is not settled whether the Hindu *rule of survivorship* is applicable to the families of Native Christians who *continue to be joint* even after conversion. According to the Madras High Court, it is not applicable to such families (*i*); according to the Bombay High Court, it is (*j*). Two Hindu brothers *A* and *B*, constituting a joint Hindu family, become converts to Christianity and continue to be joint after their conversion. *B* dies leaving a widow. According to the Madras High Court, *B*'s one-half share in the property should go to his heirs under the Indian Succession Act, 1925. According to

(*b*) *Rani Bhagwan Koer* v. *Bose* (1903) 31 Cal. 11, 30 I.A. 249; *Ma Yait* v. *Maung Chit* (1921) 49 Cal. 310, 321, 48 I.A. 553, 562, 66 I.C. 609, ('22) A. PC. 197; *Iswari Prashad* v. *Rai Hari Prasad* (1927) 6 Pat. 506, 106 I.C. 620, ('27) A.P. 145 (Kayasthas of Bihar).

(*c*) *Mahant Basant* v. *Hem Singh* (1926) 7 Lah. 275, 94 I. C. 695, ('26) A. L. 100.

(*d*) *Nalinaksha* v. *Rajani* (1931) 58 Cal. 1392, 134 I.C. 1272, ('31) A.C. 741.

(*e*) *Lingappa* v. *Esudasan* (1904) 27 Mad. 13 (maintenance).

(*f*) *Charanjit Singh* v. *Amir Ali Khan* (1921 2 Lah. 243, 248, 64 I.C. 892, ('21) A.L. 121.

(*g*) *Kamawati* v. *Digbijai Singh* (1921) 43 All. 525, 48 I.A. 381, 64 I.C. 559, ('22) A. PC. 14; *Dagree* v. *Pacotti* (1895) 19 Bom. 783.

(*h*) *Abraham* v. *Abraham* (1863) 9 M.I.A. 199, 241; *Sri Gajapathi* v. *Gajapathi* (1870) 14 W. R. (P. C.) 33.

(*i*) *Tellis* v. *Saldanha* (1887) 10 Mad. 69. See also *Jogi Reddi* v. *Chinnabi Reddi* (1929) 56 I.A. 6, 9-11, 52 Mad. 83, 87-90, 114 I.C. 5, ('29) A. PC. 13.

(*j*) *Francis Ghosal* v. *Gabri Ghosal* (1907) 31 Bom. 25. See *Kulada* v. *Haripada* (1913) 40 Cal. 407, 417-418, 17 I.C. 257.

S. 7 the Bombay High Court, *B*'s one-half share should go to *A* by *survivorship*. The decision of the latter Court proceeds on the ground that the Indian Succession Act, 1925, deals with inheritance and does not affect rights of coparcenership as between those to whom it applies.

(*3*) to descendants of Hindus who have formed themselves into a distinct community or sect with a peculiar religion and usages so different from the principles of the shastras that the community cannot but be regarded as being outside Hinduism in the proper meaning of the word. The Kalais of Burma constitute such a community. They are not Hindus within the meaning either of sec. 331 of the Indian Succession Act, 1865 [now the Indian Succession Act, 1925, s. 58], or of sec. 13 of the Burma Laws Act, 1898 (*k*);

"It is obvious that few influences can be more potent in producing new communities of this separate kind than the combined operation of migration, intermarriage and new occupations" (*l*).

(*4*) to converts from the Hindu to the Mahomedan faith.

The succession to the estate of a convert from the Hindu to the Mahomedan faith is governed by the Mahomedan, and not by the Hindu law. Khojas and Cutchi Memons, who are converts from Hinduism to Mahomedanism, and who, in accordance with their customs have hitherto been governed by the Hindu law of inheritance and succession will hereafter be governed by the Muslim personal law except where the questions relate to agricultural lands (*vide* Act XXVI of 1937 and Mulla's Mahomedan Law, 11th edition, p. 3).

The Hindu law of succession does not apply to the property of any person professing the Hindu, Sikh, or Jain, religion who marries under the Special Marriage Act III of 1872 or the property of the issue of such marriage. These are governed by secs. 32 to 48 of the Indian Succession Act.

(*k*) *Ma Yait* v. *Maung Chit* (1921) 49 Cal. 310, 48 I. A. 553, 66 I. C. 609, ('22) A. PC. 197.

(*l*) *Ma Yait* v. *Maung Chit* (1921) 49 Cal. 310, 322, 48 I.A. 553, 563, 66 I.C. 609, ('22) A. PC. 197.

CHAPTER II.

SOURCES OF HINDU LAW.

Texts.—1. "The Veda, the Smriti, the approved usage, and what is agreeable to one's soul [or good conscience] the wise have declared to be the quadruple direct evidence of Dharma [law]."—*Manu*, ii, 12.

2. "The Sruti, the Smriti, the approved usage, what is agreeable to one's soul [or good conscience] and desire sprung from due deliberation, are ordained the foundation of *Dharma* [law]."—*Yajnavalkya*, i, 7.

3. "Whatever customs, practices and family usages prevail in a country shall be preserved intact, when it comes under subjection by (conquest)."—*Yajnavalkya*, i, 343.

4. "If any usage required by utility is established in a locality [which is contrary to the written text of law] it should be practised therein only, but not in any other district. Whatever customary law is prevalent in a district, in a city, in a town or in a village, or among the learned, the said law [though contrary to the Smritis] must not be disturbed."—*Devala*, cited in the *Parasara Madhava*.

Note.—In texts (1) and (2), we find indications of the principle of *justice, equity and good conscience.* As to texts (3) and (4), it will be seen that the Courts have not disregarded customs prevailing in the different parts of British India, except, of course immoral customs.

8. Sources of Hindu Law.—The three main sources of Hindu *dharma* or law are (1) the Sruti, (2) the Smriti, and (3) Custom. S. 8

(1) "Sruti" means, literally, that which was *heard.* The Srutis are believed to contain the very words of the deity, and they include the four Vedas, but they contain very little of law.

(2) "Smriti" means, literally, that which was *remembered.* It is the recollection handed down by the Rishis, or sages of antiquity, of the precepts of God. The Smritis constitute the principal source of law. The term *Dharma Shastra*, literally, *teacher of law*, comprehends both Srutis and Smritis, but it is often used to designate the Smritis alone.

The three principal Smritis are—

(*i*) The Code or Institutes of Manu, compiled some time between 200 B.C. and 200 A.D.

(*ii*) The Code or Institutes of Yajnavalkya, written about the 4th century, A.D. The Mitakshara is the leading commentary upon this Code.

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(*iii*) The Code or Institutes of Narada, written in the 5th or 6th century, A.D.

(3) Customs are supposed by some writers to be based on lost or forgotten Sruti, and by others, on lost or forgotten Smriti (*m*).

9. **Commentaries as a source of law.**—The Smritis do not agree with each other in all respects. The conflict between the Smritis gave rise to commentaries which are called Nibandhas. The authority of the several commentators varied in different districts, and thus arose the schools of law which are operative in different parts of India. Though the commentators professed to interpret the law laid down in the Smritis, in fact, they recited the customs and usages which they found in vogue around them (*n*) and on this ground their interpretations have been accepted as authoritative. It is therefore the duty of British Indian Courts to recognize the rules of law enunciated in the commentaries, even if they appear to proceed on a wrong interpretation of the Smritis, the reason being that under the Hindu system of law, "clear proof of usage will outweigh the written text of the law (*o*)."

The commentaries which have been accepted as authoritative in the different provinces are mentioned in sections 11 to 12 below.

In the leading case of *Collector of Madura* v. *Moottoo Ramalinga* (*o*), their Lordships of the Privy Council, after stating that the different commentaries had given rise to the different schools of law, said:—"The duty, therefore, of an European Judge, who is under the obligation to administer Hindu law, is not so much to inquire whether a disputed doctrine is fairly deducible from the earliest authorities [Smritis], as to ascertain whether it has been received by the particular school which governs the district with which he has to deal, and has there been sanctioned by *usage*. For, under the Hindu system of law, *clear proof of usage will outweigh the written text of the law.*"

10. **Judicial decisions as a source of law.**—Judicial decisions on Hindu law, though sometimes loosely spoken of as a source of law, are not strictly a source of law. Almost all the important points of Hindu law are now to be found in the law reports, and to this extent it may be said that the

(*m*) G. Sarkar's "Hindu Law," 7th ed., chapter I, pp. 24-25; Banerjee's Law of Marriage and Stridhana, 5th ed; pp. 11-12.

(*n*) *Kesho Rao* v. *Sadasivo Rao* (1938) Nag. 469 ('38) A. N. 163.

(*o*) *Collector of Madura* v. *Moottoo Ramalinga* (1868) 12 M. I. A. 397, 435-436.

decisions on Hindu law have superseded the commentaries. The decisions of the Privy Council are binding on all the Courts of British India including the High Courts; but the decisions of any one High Court are not binding on any other High Court, though they are binding on the Courts subordinate thereto (*p*). Ss. 10, 11

The Hindu law was at first administered by the English Judges with the assistance of Hindu *Pundits*. The institution of *Pundits*, as official referees of the Courts, was abolished in the year 1868.

11. **Mitakshara and Dayabhaga Schools.**—(*1*) "The remoter sources of the Hindu law [that is, Smritis] are common to all the different schools. The process by which those schools have been developed seems to have been of this kind. Works universally or very generally received became the subject of subsequent commentaries. The commentator put his own gloss on the ancient text; and his authority having been received in one and rejected in another part of India, schools with conflicting doctrines arose" (*q*).

(*2*) Properly speaking, there are only two schools of law, namely, the Mitakshara school and the Dayabhaga school. The Dayabhaga school prevails in Bengal; the Mitakshara school prevails in other parts of British India.

(*3*) The Mitakshara is a running commentary on the Code of Yajnavalkya. It was written by Vijnaneswara in the latter part of the eleventh century. The Dayabhaga is not a commentary on any particular Code, but purports to be a digest of all the Codes. It was written by Jimuta Vahana who is said to have flourished somewhere between the 13th and the 15th century.

(*4*) The Mitakshara is of supreme authority throughout India except in Bengal. The Dayabhaga is of supreme authority in Bengal. But even in Bengal the Mitakshara is still regarded as a very high authority on all questions in respect of which there is no express conflict between it and the Dayabhaga and the other works prevalent there, namely, the

(*p*) *Korban Ally* v. *Sharoda* (1884) 10 Cal. 82; *Balaji* v. *Sakharam* (1893) 17 Bom. 555.

(*q*) *Collector of Madura* v. *Moottoo Ramalinga* (1868) 12 M. I. A. 397, 435.

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Dayatattwa and the Dayakrama Sangraha (*r*). The Dayabhaga may also be referred to in a Mitakshara case on points on which the latter treatise is silent (*s*).

(*5*) It is said that the Mitakshara school is the orthodox school, and the Dayabhaga school is the reformed school, of Hindu law. The Dayabhaga school is also called the Bengal school of Hindu law.

(*6*) The Bengal school differs from the Mitakshara school in two main particulars, namely, the law of inheritance and the joint family system.

12. Sub-divisions of Mitakshara School.—(*1*) The Mitakshara school is sub-divided into four minor schools; these differ between themselves in some matters of detail relating particularly to adoption and inheritance. All these schools acknowledge the supreme authority of the Mitakshara, but they give preference to certain treatises and to commentaries which control certain passages of the Mitakshara. This accounts for the differences between those schools (*t*).

The sub-schools and the works which supplement the Mitakshara in each sub-school are mentioned below :—

Benares school	Viramitrodaya (*u*). Nirnayasindhu.
Mithila school	Vivada Chintamani (*v*). Vivada Ratnakara (*w*).
Maharashtra or Bombay school [Western India].	Vyavahàra Mayukha. Viramitrodaya (*x*). Nirnayasindhu.
Dravida or Madras school [Southern India].	Smriti Chandrika (*y*). Parasara Madhaviya (*z*). Viramitrodaya (*a*). Saraswati Vilasa (*b*).

(*r*) *Bhugwandeen* v. *Myna Bace* (1867) 11 M. I. A. 487, 507-508; *Collector of Madura* v. *Mootoo Ramalinga* (1868) 12 M. I. A. 397, 435; *Akshay* v. *Hari Das* (1908) 35 Cal. 721.

(*s*) *Rai Bishenchand* v. *Asmaida Koer* (1884) 6 All. 560, 11 I.A. 164, 179; *Mahabir Prasad* v. *Raj Bahadur Singh* (1943) 18 Luck. 585, 203 I.C. 244, ('42) A. O. 27.

(*t*) (1867) 11 M. I. A. 487-507-508, *supra*.

(*u*) *Gridhari Lall* v. *The Bengal Government* (1868) 12 M. I. A. 448, 466; *Jugannath* v. *Ranjit Singh* (1898) 25 Cal. 354, 367-368.

(*v*) (1867) 11 M. I. A. 487, 508, *supra*.

(*w*) (1867) 11 M. I. A. 487, 508, *supra*; *Kamala Prasad* v. *Murli Manohar* (1934) 13 Pat. 550, 152 I. C. 446, ('34) A. P. 398 where Dhavle, J., mentions other works which supplement the Mitakshara.

(*x*) *Vedachela* v. *Subramania* (1921) 48 I. A. 349, 362, 44 Mad. 753, 764, 64 I. C. 402, ('22) A. PC. 33.

(*y*) *Raju* v. *Ammani* (1906) 29 Mad. 358.

(*z*) (1867) 11 M. I. A. 487, 508, *supra*.

(*a*) *Moniram* v. *Keri Kolitani* (1880) 5 Cal. 776, 788-789, 7 I. A. 115, 153.

(*b*) (1921) 44 Mad. 753, 765, 48 I. A. 349, 64 I. C. 402, ('22) A. PC. 33, *supra*.

(2) As regards authorities in Western India the Mitakshara ranks first and paramount in the Maharashtra, Northern Kanara and the Ratnagiri District. In Gujerat, the Island of Bombay and the North Konkan, the Mayukha is considered as the overruling authority where there is a difference of opinion between it and the Mitakshara (c). The principle, however, adopted by the High Court of Bombay, and sanctioned by the Privy Council, is to construe the two works so as to harmonize them with each other wherever and so far as that is reasonably possible (d). In Poona, Ahmednagar, and Khandesh the Mayukha is considered to be of equal authority with the Mitakshara, but not capable of overruling it as in Gujerat, the Island of Bombay and the North Konkan (e).

The Mayukha was written by Nilkantha Bhatta in the beginning of the 17th century.

The Viramitrodaya was written in the 16th century. "It supplements many gaps and omissions in the earlier commentaries" (f).

13. Works on adoption.—The two special works on adoption are the Dattaka Mimansa and the Dattaka Chandrika. Generally speaking they are equally respected throughout India, but where they differ the Dattaka Mimansa is preferred in Mithila and Benares, and the Dattaka Chandrika in Bengal (g).

As to these two works their Lordships of the Privy Council said in *Balusu* v. *Balusu* (h): "Both works have had a high place in the estimation of Hindu lawyers in all parts of India, and having had the advantage of being translated into English at a comparatively early period, have increased their authority during the British rule. Their Lordships cannot concur with Mr. Knox, J., in saying that their authority is open to examination, explanation, criticism, adoption, or rejection like any scientific treatises on European jurisprudence. Such treatment would not allow for this effect, which long

(c) *Krishnaji* v. *Pandurang* (1875) 12 Bom. H. C. 65; *Lallubhai* v. *Mankuvarbai* (1878) 2 Bom. 388, 418; *Sakharam* v. *Sitabai* (1879) 3 Bom. 353, 365; *Balkrishna* v. *Lakshmun* (1890) 14 Bom. 605; *Jankibai* v. *Sundra* (1890) 14 Bom. 612, [Mahad is not within the Northern Konkan]; *Narhar* v. *Bhau* (1916) 40 Bom. 621; 36 I. C. 539, ('16) A. B. 206.

(d) Per Telang, J., in *Gojabai* v. *Shrimant Shahajirao* (1893) 17 Bom. 114, 118, approved in *Bai Kesserbai* v. *Hunsraj* (1906) 30 Bom. 431, 442, 33 I. A. 176; *Bhagwan* v. *Warubai* (1908) 32 Bom. 300, 312; *Mahabir Prasad* v. *Raj Bahadur Singh* (1943) 18 Luck. 585, 203 I. C. 244, ('42) A. O. 27.

(e) *Bhagirthibai* v. *Kahnujirao* (1887) 11 Bom. 285, 294. [F.B.]

(f) *Vedachela* v. *Subramania* (1921) 48 I. A. 349, 362, 44 Mad. 753, 764, 64 I. C. 402, ('22) A. PC. 33; *Jotindra Nath Roy* v. *Nagendra Nath Roy* (1931) 58 I. A. 372, 59 Cal. 576, 135 I. C. 637, ('31) A. PC. 268.

(g) *Balusu* v. *Balusu* (1899) 22 Mad. 398, 411-412, 26 I. A. 113, 131, 132; *Radha Mohan* v. *Hardai Bibi* (1898) 21 All. 460, 465-466; *Bhagwati* *Singh* v. *Bhagwan Singh* (1898) 21 All. 412, 419, 26 I. A. 153, 161; *Puttu Lal* v. *Parbati Kunwar* (1915) 37 All. 359, 367, 42 I. A. 155, 161, 29 I.C. 617, ('15) A. PC. 15; *Collector of Madura* v. *Moottoo Ramalinga* (1868) 12 M. I. A. 397, 437.

(h) (1899) 22 Mad. 398, 411-412, 26 I. A. 113, 131-132.

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acceptance of written opinions has upon social coustoms, and it would probably disturb recognised law and settled arrangements. But, so far as saying that caution is required in accepting their glosses where they deviate from or add to the Smritis, their Lordships are prepared to concur with the learned Judge."

As to the Dattaka Chandrika it may be said that in Bengal there is a tradition that it is a literary forgery by Raghumani Vidayabhushana who was the Pundit of Colebrooke, the celebrated English translator of numerous Sanskrit works on Hindu law. It is said that it was written to help a claim set up by an adopted son to a Raj in Bengal.

Before leaving this subject, attention may be drawn also to the Mimansa of Jaimini, a work which contains rules of interpretation of Hindu law.

14. **Migration and school of law.**—(*1*) A Hindu family residing in a particular province of India is presumed to be governed by the law of the place in which it resides (*i*).

(*2*) Where a Hindu family migrates from one province to another, the presumption is that it carries with it its personal law, that is, the laws and customs as to succession and family relations prevailing in the province from which it came. But this presumption may be rebutted by showing that the family has adopted the law and usages of the province to which it has migrated (*j*).

(*3*) It is the law existing at the time of migration which continues to govern the migrated members until it is renounced. It is the law in force in the province at the time of their leaving it which continues to govern persons who have migrated to another province. Thus they are affected by decisions of the Courts of their province of origin which declare the correct law of the province up to the time of their leaving it, but not by customs incorporated in its law after they have left it (*k*).

Illustrations.

(a) A Hindu family migrates from the North-Western Provinces where the Mitakshara law prevails to Bengal where the Dayabhaga law prevails. The presumption is that it continues to be governed by the Mitakshara law, and this presumption may be supported by previous instances of succession in the family according to the Mitakshara law after its migration and by evidence relating to ceremonies performed in the

(*i*) *Ram Das* v. *Chandra* (1893) 20 Cal. 409.

(*j*) *Srimati Parbati* v. *Jagadis* (1902) 29 Cal. 433, 29 I. A. 82; *Soorendranath* v. *Heeramonee* (1868) 12 M. I. A. 81; *Govind* v. *Radha* (1909) 31 All. 477, 3 I. C. 563; *Jagannath* v. *Narayan* (1910) 34 Bom. 553, 7 I. C. 459; *Sarada Prasanna* v. *Umakanta* (1923) 50 Cal. 370, 77 I. C. 450, ('23) A. C. 485. See also *Mailathi* v. *Subbaraya* (1901) 24 Mad. 650 (migration by a Hindu widow from French India to British India); *Kulada* v. *Haripada* (1913) 40 Cal. 407, 17 I. C. 257; *Sukhbir Singh* v. *Mangeisar Rao* (1927) 49 All. 302, 100 I. C. 778, ('27) A. A. 252; *Babu Motising* v. *Durgabai* (1929) 53 Bom. 242, 114 I. C. 379, ('29) A. B. 57; *Basant Kumar Basu* v. *Ram Shanker Roy* (1932) 59 Cal. 859, 138 I. C. 882, ('32) A. C. 600; *Suganchand* v. *Mangibai* (1942) Bom. 467, 201 I. C. 759 ('42) A. B. 185.

(*k*) *Balwant Rao* v. *Baji Rao* (1920) 47 I. A. 213, 48 Cal. 30, 57 I. C. 545, ('21) A. PC. 59.

family at marriages, births and *sradhas*, showing that the family continued to be governed by the Mitakshara law after its migration: *Parbati* v. *Jagadis* (1902) 29 Cal. 433, 452, 29 I. A. 82, 97. If the migration is proved, and it is also proved that the family followed the customs of the Mitakshara school, it is not necessary to prove also that the family immigrated to Bengal after the establishment of the Dayabhaga system of law (*l*). Ss. 14-16

(b) A joint Hindu family, consisting of two brothers *A* and *B*, migrates from the N. W. P. to Bengal. *A* dies leaving a widow *C*. The presumption being that this family continues to be governed by the Mitakshara law, the joint property will, on *A*'s death, pass to his surviving brother *B*; *C* will be entitled to maintenance only. But if the family had renounced the Mitakshara law, and adopted the Dayabhaga law, *A*'s share would pass to his widow *C*: *Parbati* v. *Jagadis* (1902) 29 Cal. 433, 29 I. A. 82.

A Maharashtrian family residing in Chhatisgarh, in Central Provinces, is presumed to have come as immigrant and if it retains its individuality as Maharashtrian, is governed by the Bombay interpretation of the Mitakshara: *Kesho Rao* v. *Sadasivo Rao* (1938) Nag. 469, ('38) A. N. 163.

In *Abdurahim* v. *Halimabai* (*m*), their Lordships of the Privy Council said: "Where a Hindu family migrates from one part of India to another, *prima facie* they carry with them their personal law, and, if they are alleged to have become subject to a new local custom, this new custom must be affirmatively proved to have been adopted, but when such a family emigrate [from India] to another country [East Africa], and, being themselves Mahomedans [*e.g.*, Memons], settle among Mahomedans, the presumption that they have accepted the law of the people whom they have joined seems to their Lordships to be one that should be much more readily made . . . The analogy is that of a change of domicil on settling in a new country rather than the analogy of a change of custom on migration within India." "Of course, if nothing is known about a man except that he lived in a certain place, it will be assumed that his personal law is the law which prevails in that place. In that sense only is domicil of importance" (*n*).

Clause (3).—"The law must be the family law as it was when they left. A judgment declaratory of law as having always been would bind; but it would be a different thing if subsequent customs became incorporated in the law" (*o*).

Raghuvamshis of Nandurbar.—These migrated from Oudh and settled in Khandesh and they are governed by the Benares School of Hindu Law (*p*).

15. Custom as a source of law.—Custom is one of the three sources of Hindu law. Where there is a conflict between a custom and a text of the Smritis, the custom overrides the text: "Under the Hindu system of law, clear proof of usage will outweigh the written text of the law" (*q*).

16. Three kinds of customs.—The Hindu customs recognized by the Courts of British India are—(1) local, (2) class, and (3) family customs.

(*l*) *Ramesh Chandra* v. *Mohammed* (1923) 50 Cal. 898, 79 I. C. 309, ('24) A. C. 383.

(*m*) (1916) 43 I. A. 35, 41, 18 Bom. L. R. 635, 32 I. C. 413, ('15) A. PC. 86. See also *Ma Yait* v. *Maung Chit Maung* (1921) 49 Cal. 310, 48 I. A. 553, 564, 66 I. C. 609, ('22) A. PC. 197.

(*n*) *Balvant Rao* v. *Baji Rao* (1920) 47 I. A. 213, 219, 48 Cal. 30, 39, 57 I. C. 545, ('21) A. PC. 59; *Tula Ram* v. *Shyam* (1927) 49 All. 848, 86 I. C. 729, ('25) A. A. 648.

(*o*) (1920) 47 I. A. 213, 222, 48 Cal. 30, 43, 57 I. C. 545, ('21) A. PC. 59, *supra*.

(*p*) *Babu Motising* v. *Durgabai* (1929) 53 Bom. 242, 114 I. C. 379, ('29) A. B. 57.

(*q*) *Collector of Madura* v. *Mootoo Ramalinga* (1868) 12 M. I. A. 397, 436; *Vannia Kone* v. *Vannichi Ammal* (1928) 51 Mad. 1, 108 I. C. 760, ('28) A. M. 299.

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17. Essentials of a valid custom.—(*1*) "A custom is a rule which in a particular family or in a particular district, has from long usage obtained the force of law. It must be *ancient*, *certain*, and *reasonable*, and being in derogation of the general rules of law, must be construed strictly" (*r*). It is further essential that it should be established to be so by clear and unambiguous evidence, for it is only by means of such evidence that the Courts can be assured of its existence and of the fact that it possesses the conditions of antiquity and certainty on which alone its legal title to recognition depends (*s*). It must not be opposed to morality or public policy and it must not be expressly forbidden by the legislature (*t*).

(*2*) Where the proof of a custom rests upon a limited number of instances of a comparatively recent date, the Court may hold the custom proved so as to bind the parties to the suit and those claiming through and under them; but the decision would not in that case be a satisfactory precedent if in any future suit between *other* parties fuller evidence with regard to the alleged custom should be forthcoming (*u*). A judgment relating to the existence of a custom is admissible to corroborate the evidence adduced to prove such custom in another case (*v*). Where, however, a custom is repeatedly brought to the notice of the Courts the Courts may hold that the custom was introduced into the law without the necessity of proof in each individual case (*w*).

Family Custom.—Custom binding inheritance in a particular family has long been recognized in India (*x*).

(*r*) *Hurpurshad* v. *Sheo Dyal* (1876) 3 I. A. 259, 285.

(*s*) *Ramalakshmi* v. *Sivanantha* (1872) 14 M. I. A. 570, 585-586. See as to evidence of custom, *Gopalayyan* v. *Raghupatiayyan* (1873) 7 Mad. H. C. 250; *Mira Bibi* v. *Vellayanna* (1885) 8 Mad. 464; *Harnabah* v. *Mandil* (1900) 27 Cal. 379; *Rupchand* v. *Jambu Prasad* (1910) 32 All. 247, 252, 37 I. A. 93, 6 I. C. 272; *Abdul Husein Khan* v. *Bibi Sona Dero* (1918) 45 Cal.450, 45 I. A. 10, 43 I. C. 306, ('17) A. PC. 181; *Ram Narain* v. *Har Narinjan Kuar* (1923) 4 Lah. 297, 76 I. C. 535, ('24) A. L. 116; *Vannia Kona* v. *Vannichi Ammal* (1928) 51 Mad. 1, 108 I. C. 760, ('28) A. M. 299; *Bhikabai* v. *Manilal* (1930) 54 Bom. 780, 128 I. C. 628, ('30) A. B. 517; *Gulabchand* v. *Mannilal* (1941) 16 Luck. 302, 192 I. C. 643, ('41) A. O. 230.

(*t*) *Vannia Kone* v. *Vannichi Ammal*, *supra*.

(*u*) *Chiman Lal* v. *Hari Chand* (1913) 40 I.A. 156, 160, 40 Cal. 879, 890, 19 I. C. 669: *Rup Chand* v. *Jambu Parshad* (1910); 37 I. A. 93, 104, 32 All. 247, 252, 6 I. C. 272; *Parshottam* v. *Venichand* (1921) 45 Bom. 754, 760, 761, 61 I. C. 492, ('21) A.B. 147.

(*v*) *Mst. Kasarbai* v. *Inder Sinch* (1945) Nag. 1, 71 I. A. 190.

(*w*) *Rama Rao* v. *Rajah of Pithapur* (1918) 45 I. A. 198, 41 Mad. 778, 47 I. C. 354, ('18) A. PC. 81; *Hemendranath Roy* v. *Gnanendranath* ('35) A. C. 702, 62 Cal. L. J. 49; *Banarsi Das* v. *Sumat Prasad* (1936) 58 All. 1019, 164 I. C. 1047, ('36) A. A. 641; *Hemendranath Ray Chaudhari* v. *Jnanendra Prasanna Bhaduri* (1936) 63 Cal. 155, 159 I. C. 1101, ('35) A. C. 702; *Suganchand* v. *Mangibai* (1942) Bom. 467, 201 I. C. 759, ('42) A. B. 185.

(*x*) *Abdul Husein Khan* v. *Bibi Sona Dero* (1918) 45 Cal. 450, 460, 45 I.A. 10, 14, 43 I.C. 306, ('17) A.PC. 181.

18. Discontinuance of custom.—A family usage, like a local custom, must be certain, invariable and continuous, *but it may be discontinued* so as to let in the ordinary law. Well established discontinuance of a *family* usage, whether it has arisen from accidental causes, or has been intentionally brought about by the concurrent will of the family, has the effect of destroying the custom; it is different, however, in the case of a *local* custom which is the *lex loci* binding on all persons within the local limits in which it prevails (*y*).

19. Burden of proof of custom.—Where members of a family admittedly governed by the Hindu law set up a custom derogatory to that law, the burden lies upon them to prove the custom (*z*). In the case of a tribe or family which were not originally Hindus, and have only adopted Hindu usages in part, if it is alleged by any member that a particular Hindu usage has been adopted by the tribe or family, the burden lies upon him to prove the usage (*a*).

The *Kurmi Mahtons* of Chota Nagpur, though aboriginals in origin, have accepted the Hindu religion and Hindu social usages. The presumption in law will, therefore, be that they are governed by the Hindu Law of Succession and the party who alleges a special custom to the contrary has to prove the same (*b*).

20. Invalid custom.—No custom is valid if it is opposed to morality or public policy or to any express enactment of the Legislature.

(*y*) *Rajkishen* v. *Ramjoy* (1876) 1 Cal. 186, 196. [P.C.]; *Sarabjit* v. *Indarjit* (1905) 27 All. 203; *Vannia Kone* v. *Vannichi Ammal*, *supra*.

(*z*) *Bhugwan Singh* v. *Bhugwan Singh* (1899) 21 All. 412, 423; *Chandika Baksh* v. *Muna Kuar* (1902) 24 All. 273, 29 I. A. 70; *Rupchand* v. *Jambu Parshad* (1910) 37 I.A. 93, 32 All. 247, 6 I. C. 272; *Sahdeo Narain Deo* v. *Kusum Kumari* (1923) 50 I. A. 58, 62-64, 2 Pat. 230, 71 I. C. 769, ('23) A. PC. 21; *Shamlal* v. *Jiyabai* (1943) Nag. 678, ('44) A. N. 62.

(*a*) *Tanindra Deb* v. *Rajeswar* (1885) 11 Cal. 463, 476, 12 I. A. 72, 88; *Muhammad Ibrahim* v. *Shaikh Ibrahim* (1922) 49 I.A. 119, 45 Mad. 308, 67 I. C. 115, ('22) A.PC. 59.

(*b*) *Ganesh Mahto* v. *Shib Charan Mahto* (1932) 11 Pat. 139, 133 I. C. 165, ('31) A. P. 305.

CHAPTER III.

GENERAL PRINCIPLES OF INHERITANCE.

Ss. 21-24

21. Law of inheritance.—The joint and undivided family is the normal condition of Hindu Society. An undivided Hindu family is ordinarily joint, not only in estate, but in food and worship.

The joint family system comes first in historical order. The law of inheritance is of later growth and, in general, applies only to property held in absolute severalty by the last owner, as distinguished from property held by a Mitakshara joint family. But now under Act XVIII of 1937, the interest which a Hindu, governed by any school of law other than the Dayabhaga or by customary law, has in joint family property, devolves upon his death on his widow.

22. Two systems of inheritance.—There are two systems of inheritance amongst the Hindus in British India, namely, the Mitakshara system and the Dayabhaga system. The Dayabhaga system prevails in Bengal; the Mitakshara system in other parts of British India. The difference between the two systems arises from the fact that while the doctrine of religious efficacy is the guiding principle under the Dayabhaga school (sec. 79) there is no such definite guiding principle under the Mitakshara school. Sometimes, consanguinity has been regarded as the guiding principle and at other times, religious efficacy (sec. 36 *et seq.*)

23. Inheritance to males and females.—(*1*) Succession to stridhana, that is, property held absolutely by a *female*, is governed by rules different from those which govern inheritance to the property of a *male*.

(*2*) Inheritance to males according to the Mitakshara school is dealt with in Chapter IV and that according to the Dayabhaga school is dealt with in Chapter VII. Succession to stridhana is dealt with in Chapter X.

24. Modes of devolution of property.—(*1*) The Mitakshara recognizes two modes of devolution of property, namely, survivorship and succession. The rule of survivorship applies to joint family property; the rules of succession apply to property held in absolute severalty by the last owner.

(*2*) The Dayabhaga recognizes only one mode of devolution, namely, succession. It does not recognize the

rule of survivorship even in the case of joint family property. The reason is that while every member of a Mitakshara joint family has only an *undivided* interest in the joint property, a member of a Dayabhaga joint family holds his share in *quasi-severalty*, so that it passes on his death to his heirs as if he was absolutely seized thereof, and not to the surviving coparceners as under the Mitakshara law. Ss. 24-26

Illustrations.

(1) *A* and *B*, two Hindu brothers, governed by the Mitakshara school of Hindu law, are members of a joint and undivided family. *A* dies leaving his brother *B* and a daughter. *A*'s share in the joint family property will pass to his brother, the *surviving coparcener*, and not to his daughter. But if *A* and *B* were separate, *A*'s property would on his death pass to his daughter as his *heir*.

(2) *A* and *B*, two Hindu brothers, governed by the Dayabhaga school, are members of a joint and undivided family. *A* dies leaving his brother *B* and a widow. *A*'s share in the joint family property will pass to his widow as his *heir*, exactly as if *A* and *B* were separate.

25. Female heirs.—According to the Bengal, Benares and Mithila schools, there are only five females who can succeed as heirs to a male, namely, (1) the widow, (2) daughter, (3) mother, (4) father's mother, and (5) father's father's mother. To this list three more have been added by the Hindu Law of Inheritance (Amendment) Act, 1929, namely, the son's daughter, daughter's daughter, and sister. The Madras school recognizes a larger number of female heirs including the three mentioned in the Act of 1929, and the Bombay school a still larger number. Under Act XVIII of 1937, the widow of a predeceased son and the widow of a predeceased son of a predeceased son are among the heirs to a Hindu's separate property in all the schools.

26. Limited estate of females.—(*1*) Males succeeding as heirs whether to a male or to a female, take absolutely.

(*2*) Females succeeding as heirs, whether to a male or to a female, take a limited estate in the property inherited by them, except in certain cases in the Bombay Presidency.

If a separated Hindu under the Mitakshara, or any Hindu under the Dayabhaga, dies leaving a widow and a brother, the widow succeeds to the property as his heir. But the widow, being a female, does not take the property absolutely. She is entitled only to the income of the property. She cannot make a gift of the property nor can she sell it unless there is a legal necessity either for the gift or for the sale. On her death, the property will pass not to her heirs, but to the next heir of her husband, that is, his brother.

Ss. 27, 28

27. 'Last full owner' and 'fresh stock of descent.'—The last 'full' owner of property is one who held the property *absolutely* at the time of his death. Except in the case of stridhana and in certain cases in the Bombay Presidency, the last full owner is always a *male*.

It is only a 'full' owner that can become a fresh stock of descent. Since a female cannot (except as aforesaid) be a full owner of property, she cannot become a fresh stock of descent.

Illustrations.

A dies leaving a widow, a mother, a brother *B*, and a paternal uncle *C*. On *A*'s death, the widow succeeds to his property as his heir. She takes only a limited estate in the property. She is not the full owner of the property, and she cannot, therefore, become a fresh stock of descent. On her death, the property will revert to the next heir of the last full owner (*A*), that is, the mother. The mother, again, does not take absolutely. She too, therefore, cannot become a fresh stock of descent, and on her death the property will go not to her heirs, but to the next heir of the last owner (*A*), that is to *B*, *A*'s brother. But *B*, being a male, takes the property absolutely. He becomes full owner of the property and he can, therefore, become a fresh stock of descent. On his death, the property will pass to his own heirs. Thus if he leaves a widow, the property will pass to her, and not to *C*. But since she takes a limited estate only, the property will, on her death, revert to the next heir of *B*, the last full owner. If that heir is *C*, the property will pass to him. *C*, being a male, will take the property absolutely and on his death it will again pass to his heirs.

A male heir takes the property inherited by him absolutely; he becomes full owner thereof, and he can, therefore, become a fresh stock of descent. Except in the case of stridhana and in certain cases in the Bombay Presidency, a *female* takes a limited estate in the property inherited by her; she does not become the full owner thereof, and she cannot, therefore, become a fresh stock of descent. The limited estate taken by female heirs is a peculiar feature of the Hindu law. Barring, therefore, the case of stridhana and the exceptional cases in the Bombay Presidency, when a female dies leaving property inherited by her, whether from a male or from a female, the property passes not to her heirs, but to the next heirs of the last full owner *from whom she inherited it*.

A woman's stridhana descends to *her* own heirs. See Chapter X below.

28. Inheritance never in abeyance.—(*1*) On the death of a Hindu, the person who is then his nearest heir becomes entitled at once to the property left by him. The right of succession vests in him immediately on the death of the owner of the property. It cannot under any circumstance remain in abeyance (*c*) in expectation of the birth of a preferable heir, where such heir was not conceived at the time of the owner's death.

(*2*) Where the estate of a Hindu has vested in a person who is his nearest heir at the time of his death, it cannot be

(*c*) *Sm. Shakuntala Devi* v. *Kaushalya Devi* (1936) 17 Lah. 356, ('36) A. L. 174, 162 I. C. 718; *Srinivasa Rao & Ors.* v. *Annadhanam Seshacharlu & Ors.* (1942) Mad. 42, 198 I. C. 169, ('42) A. M. 106, 2 M.L.J. 406.

divested except either by the *birth* of a preferable heir such as **Ss. 28, 29**
a son or a daughter (*d*), who was conceived at the time of his death, or by *adoption* in certain cases of a son to the deceased (*e*).

Illustrations.

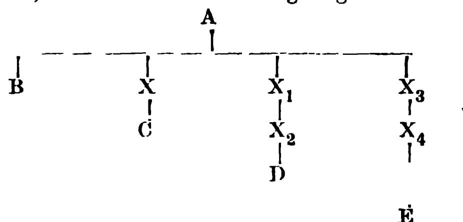
(1) *A* dies leaving a son who is insane from birth, and a nephew. The son, being insane, cannot inherit according to the Hindu law. *A*'s property will, therefore, pass to the nephew. The son marries, and a son *B* is subsequently born to him. *B*, as *A*'s grandson, is a nearer heir of *A* than the nephew. *B* claims *A*'s property from the nephew. He is not entitled to it, for the estate of *A* having vested in the nephew, it cannot be divested by the birth of *B*, unless *B* was conceived at the time of *A*'s death.

(2) A Hindu dies leaving a widow who is pregnant at the time of his death. After his death the widow sells a house left by him for necessity. Five days after the sale a son is born to her. The sale is valid, though it was made while the son was in his mother's womb. The point of time at which the widow's estate is divested is the date of the son's *birth*, and not the date of his father's death : *Hira* v. *Buta* (1919) 1 Lah. L.J. 36, 56 I.C. 256.

29. Doctrine of representation.—A son, a grandson whose father is dead, and a great-grandson whose father and grandfather are both dead, all succeed simultaneously as one heir to the separate and self-acquired property of their paternal ancestor. The reason is that the grandson *represents* the rights of his father to a share and the great-grandson *represents* the rights both of his father and grandfather. This is the only case to which the doctrine of *representation* applies : it does not apply to any other case (*f*), *e.g.*, the case of daughter (*g*). Sons, grandsons, and great-grandsons inheriting together as aforesaid succeed to the state of the deceased as coparceners [sec. 31, ill. (a)]. On a partition among them they take *per stirpes* and not *per capita*.

Illustrations.

(a) *A*, a male Hindu, dies leaving a son *B*, a grandson *C*, a great-grandson *D*, and a great-great-grandson *E*, as shown in the following diagram :—



(*d*) *Bayava* v. *Parvatava* (1933) 35 Bom. L. R. 118, 144 I.C. 442, ('33) A.B. 126.

(*e*) *Nilcomul* v. *Jotendro* (1881) 7 Cal. 178, 188; *Kalidas* v. *Krishna* (1869) 2 Beng. L.R. F.B. 103 ; *Tagore* v. *Tagore* (1872) 9 Beng. L. R. 377, 397 ; *Bamundoss* v. *Tarinee* (1858) 7 M.I.A. 169, 184, 206 ; *Narasimha* v. *Veerabhadra* (1894) 17 Mad. 287; *Gordhandas* v. *Bai Ramcoover* (1902) 26 Bom. 449, 467 ; *Hira* v. *Buta* (1919) 1 Lah. L.J. 36, 56 I.C. 256, ('20) A.L. 160.

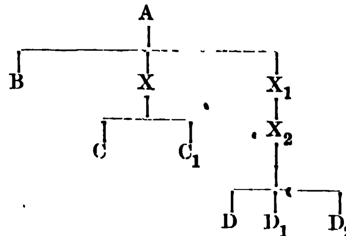
(*f*) See *Marudayi* v. *Doraisami* (1907) 30 Mad. 348.

(*g*) *Mussammat Lorandi* v. *Mst. Nihal Devi* (1925) 6 Lah. 124, 95 I.C. 701, ('25) A. L. 403.

Ss. 29, 30

On A's death, his estate will pass to B, C and D as coparceners. If they continue joint, and if any one of them dies without leaving male issue, his share will pass to the survivors (sec. 229). If they want to divide the estate, it will be divided into three equal parts, B, C and D, each taking one part. B alone is not entitled to inherit the whole property. C will take the share of his father X, and D the share of his grandfather X_1. E is not entitled to any share at all, for he is more than four degrees removed from A, and the right of representation does not extend beyond four degrees.

(b) A, a male Hindu, dies leaving a son, B, two grandsons C and C_1, and three great-grandsons D, D_1 and D_2 as shown in the following diagram :—



A's property will be divided, if the heirs choose to divide it, into three equal parts of which B will take one, C and C_1 will together take one, and D, D_1 and D_2 will together take one. This is a division of the estate *per stirpes*. To divide it *per capita* would be to divide it into 6 parts, and give one part to each of the 6 heirs.

Note.—If B had a son B_1, B would take the one-third for himself *and* B_1, and it would become ancestral property in the hands of B, to which B_1's right would attach by birth.

(c) A, a separated male Hindu, dies leaving a brother B, and a nephew C, being the son of a predeceased brother D. On A's death, C claims half the estate, alleging that had his father D been alive he would have taken one-half, and that he (C) is entitled to that half as representing his father. C's claim must be rejected, for the right of representation is confined to the lineal male descendants of the deceased owner as stated in the section, and C is not such a descendant. B therefore is entitled to the whole estate as the nearest heir of A.

30. Spes successionis.—The right of a person to succeed as heir on the death of a Hindu is a mere *spes successionis*, that is, a bare chance of succession. It is not a vested interest; he cannot, therefore, make a valid transfer of it (*h*). For the same reason, any agreement entered into by him in respect of the inheritance cannot bind persons who actually inherit when the succession opens (*i*).

Illustration.

A has a brother B and an uncle C. B has a wife D. It is true that if A died, B would succeed as his nearest heir if he was then alive, but in the lifetime of A, B does not take any interest in A's property. All that he is entitled to is a bare chance of succession. If he predeceases A, the heir on A's death will be C, and not his widow D [see ill. (c) to sec. 29]. B does not take any interest in A's property in A's lifetime

(*h*) See Transfer of Property Act, 1882, s. 6.
(*i*) *Brojo* v. *Gouree* (1870) 15 W. R. 70. See *Bahadur Singh* v. *Mohar Singh* (1902) 24 All. 94, 29 I. A. 1.

and he cannot transmit to his heir *D* an interest which had not accrued to himself. For the same reason, a sale or a mortgage by *B* of the *spes successionis* is a nullity. And, further, if he makes any contract with respect to the inheritance in *A*'s lifetime, and predeceases *A*, and *C* succeeds as *A*'s heir, the agreement is not binding on *C*. **Ss. 30, 31**

31. Co-heirs.—(*1*) According to the Mitakshara school two or more persons inheriting jointly take as tenants-in-common (*j*) except the following four classes of heirs who take as joint tenants with rights of survivorship :—

(a) Two or more sons, grandsons, and great-grandsons, succeeding as heirs to the separate or self-acquired property of their paternal ancestor (*k*).

(b) Two or more grandsons by a daughter, who are living as members of a joint family succeeding as heirs to their maternal grandfather (*l*).

(c) Two or more widows succeeding as heirs to their husband (*m*).

(d) Two or more daughters succeeding as heirs to their father (*n*), except in the Bombay Presidency where they take an absolute estate in severalty (*o*).

(*2*) According to the Dayabhaga school two or more persons inheriting jointly take as tenants-in-common, except only (1) widows, and (2) daughters who take as joint tenants with rights of survivorship.

Illustrations.

(a) A Hindu, who is possessed of separate property, dies leaving two sons, *A* and *B*. *A* then dies leaving a daughter *C*.

According to the Bengal school, *A* and *B* inherit as tenants-in-common, and, therefore, on *A*'s death, his share in the property goes to his *heir C* by *succession*.

According to the Mitakshara school, *A* and *B* inherit as joint owners [strictly speaking, as coparceners (sec. 29)]. Therefore if *A* dies without having partitioned the property, his undivided interest in the property will pass to his brother *B* by *survivorship* to the exclusion of his daughter *C*. But if the property was partitioned between *A* and *B*, the

(*j*) *Karuppai* v. *Sankaranarayanan* (1904) 27 Mad. 300.

(*k*) *Raja Jogendra* v. *Nityanand* (1890) 18 Cal. 151, 17 I. A. 128 ; *Madwalappa Irappa* v. *Subbappa Shankarappa* (1937) Bom. 906, 39 Bom. L. R. 895, ('37) A.B. 438, 172 I.C. 184 ; *Shyam Behari Singh* v. *Rameshwar Prasad Sahu* (1941) 20 Pat. 904, 198 I.C. 208, ('42) A.P. 213.

(*l*) *Raja Venkayyamma* v. *Venkataramanayyamma* (1902) 25 Mad. 678, 29 I.A. 156 ; *Muhammad Hussain Khan* v. *Babu Kishwa Nandan Sahai* (1937) 64 I. A. 250, (1937) All. 655, 39 Bom. L. R. 979, 169 I. C. 9, ('37) A. PC. 233.

(*m*) *Bhugwanden* v. *Myna Baee* (1866) 11 M. I. A. 487.

(*n*) *Chotay Lall* v. *Chunno Lall* (1879) 4 Cal. 744, 6 I. A. 15 ; *Aumirtolall* v. *Rajoneekant* (1875) 2 I. A. 113, 126, 15 Beng. L. R. 10, 24 ; *Raja Venkayyamma* v. *Venkataramanayyamma* (1902) 25 Mad. 678, 29 I. A. 156 ; *Chhattar Singh* v. *Hukum Kunwar* (1936) 58 All. 391.

(*o*) *Vithappa* v. *Savitri* (1910) 34 Bom. 510, 7 I. C. 445.

Ss. 31, 32

share which came to *A* on partition would go to his heir *C* by *succession*. Assuming that *A* and *B* did not divide the property, and that *A* died leaving a *son, grandson, or great-grandson*, the undivided interest of *A* would pass to his son, grandson or great-grandson by *survivorship*, in preference to his undivided brother *B*. The reason is that the right of survivorship of *male issue* always prevails over that of a collateral with whom the deceased was joint.

(b) A Hindu dies leaving two widows *A* and *B*. According to both the schools, the widows succeed as joint tenants. On *A*'s death, therefore, her interest in the property will pass to *B* by *survivorship* [sec. 43, no. 4].

(c) A Hindu dies leaving two daughters *A* and *B*. According to both the schools they succeed as joint tenants. On *A*'s death, therefore, her undivided interest in the property will pass to *B* by *survivorship*. It is different, however, in the Bombay Presidency. In that Presidency *A* and *B* take an absolute estate in severalty, and not as joint tenants. Therefore, on *A*'s death, her one-half share will pass to her own heirs by *succession*. Thus if *A* dies leaving a daughter, her share will go to her daughter, and not to her sister *B* [sec. 43, no. 5].

(d) A Hindu dies leaving two brothers. The brothers take as tenants-in-common and on the death of either of them, his one-half share will pass to his heirs by *succession*. The same rule applies to uncles, nephews, etc.

32. Successions per stirpes and per capita.—Except in the two cases hereinafter mentioned persons of the same relationship to the deceased take *per capita*, that is, the estate of the deceased is divided into as many shares as the number of heirs, each heir taking one share.

Exception I.—On a partition among them, the sons, grandsons and great-grandsons of a deceased male Hindu, take *per stirpes* [sec. 29].

Exception II.—Sons' sons, daughters' sons, and daughters' daughters, succeeding to stridhan take *per stirpes* (*p*) [sec. 160].

Brothers' sons, uncles' sons, etc., take *per capita*. Thus if a Hindu dies leaving 2 sons by one brother and 3 sons by another brother, the property will be divided into 5 equal parts, each heir taking one-fifth. This is division of the estate *per capita*. To divide it *per stirpes* would be to divide it into 2 equal parts, giving one part to the 2 sons of one brother, and the other part to the 3 sons of the other brother. The reason why they take *per capita* is that the brothers' sons do *not* inherit *as representing their father* but *in their own right* as the nephews of the deceased (see sec. 29). Similarly, if a Hindu dies leaving one son by a paternal uncle and two sons by another paternal uncle, the estate will be divided into three parts, each son taking one-third (*q*).

Exception I and Exception II both rest on special texts. For an illustration of Exception I, see sec. 29, ill. (b). For an illustration of Exception II, see the illustration to sec. 160.

(*p*) *Vide* authorities cited under sec. 160.

(*q*) *Narsappa* v. *Bharmappa* (1921) 45 Bom. 296, 59 I. C. 251, ('21) A. B. 408.

CHAPTER IV.

ORDER OF INHERITANCE TO MALES ACCORDING TO THE MITAKSHARA LAW.

"Sons (male issue) take the father's property. To the *nearest* sapinda the inheritance next belongs."—*Manu*, ix, 187.

33. Mitakshara law of inheritance.—The rules of inheritance laid down in the Mitakshara are followed by the Bombay, Madras, Benares and Mithila schools, all these schools being sub-divisions of the Mitakshara school. But the rules of inheritance in force in the several provinces represented by these schools are not entirely the same. They differ in certain respects, namely, **Ss. 33, 34**

(1) The order of inheritance as laid down in the Mitakshara is not strictly followed in the island of Bombay, Gujarat and the North Konkan. The reason is, that in those places preference is given to the Vyavahara Mayukha of Nilkantha Bhatta in the few points on which it differs from the Mitakshara.

(2) As regards females, there are many who are recognized as heirs in the Bombay and Madras schools, but are not recognized as such in the Benares and Mithila schools [ss. 61-70].

34. Devolution of property according to the Mitakshara law.—In determining the mode in which the property of a Hindu *male* governed by the Mitakshara law devolves on his death, the following propositions are to be noted :—

(1) Where the deceased was, at the time of his death, a member of a joint and undivided family, technically called coparcenary, his undivided interest in the coparcenary property devolves on his coparceners *by survivorship*. (But now see Act XVIII of 1937 and sec. 35).

(2) (*i*) Even if the deceased was joint at the time of his death, he might have left self-acquired or separate property. Such property goes to his heirs by *succession* according to the order given in section 43, and not to his coparceners (*r*).

(*ii*) If the deceased was at the time of his death the sole surviving member of a coparcenary, the whole of his property,

(*r*) *Katama Natchiar* v. *The Rajah of Shivagunga* (1863) 9 M. I. A. 543; *Periasami* v. *Periasami* (1878) 1 Mad. 312, 5 I. A. 61.

Ss. 34, 35

including the coparcenary property, will pass to his heirs by *succession* according to the order given in section 43 (s).

(*iii*) If the deceased was separate at the time of his death from his coparceners, the whole of his property, however acquired, will pass to his heirs by *succession* according to the order given in section 43 (t).

(3) If the deceased was re-united at the time of his death, his property will pass to his heirs by *succession* according to the rule laid down in sec. 60 below.

Illustration.

A. B. and his brother constitute a coparcenary. *A. B.* dies leaving a daughter. He leaves self-acquired property. He also leaves property inherited by him from his maternal uncle, which, according to law, is his separate property. The undivided interest of *A. B.* in the coparcenary property will pass to his brother as surviving coparcener, but his self-acquired and separate property will pass to his daughter as his heir.

35. Act XVIII of 1937.—The Hindu Women's Rights to Property Act (XVIII of 1937 amended by XI of 1938) has introduced important changes in the law of succession. The Act is not retrospective. Its main features are:

(1) In the case of separate property,

(a) the widow along with the sons is entitled to the same share as the son.

(b) A pre-deceased son's widow inherits in like manner as the son, if there is no son surviving of such pre-deceased son; and in like manner as a son's son if there is surviving a son or son's son of such pre-deceased son.

(c) The same provision applies *mutatis mutandis* to the widow of a pre-deceased son of a pre-deceased son.

(2) In the case of a Mitakshara joint family the widow takes the place of her husband (*vide* App. XII).

General effect of the Act.—Whilst the Act has conferred new rights of succession on certain females, it has dealt a death blow to the doctrine of survivorship—perhaps the most important part of the law of coparcenary under the Mitakshara.

(s) *Nagalutchmee* v. *Gopoo Nadaraja* (1856) 6 M. I A. 309.

(t) *Tekait Doorga Persad* v. *Doorga Konwari* (1878) 4 Cal. 190, 202, 5 I.A. 149, 160.

Speaking generally, the effect of the Act is to put the three female heirs mentioned in sub-section *1* to section 3 on the same level as the male issue of the last owner along with the male issue or in default of them. The Act has also put the widow of a member of a joint family in the place of her deceased husband, and the husband's interest in the joint family property under the Mitakshara vests immediately upon his death in the widow by succession and not by survivorship (*u*), of which she can claim partition in her own right and independently of any partition taking place between the sons and which a creditor can attach in execution of a decree against the husband's assets (*v*). The rule that the widow succeeds to her deceased husband's property only in default of his male issue, that is, son, grandson or great-grandson is abrogated by virtue of section 3, sub-section *1* of the Act, and she will now be entitled to the same share as a son (*w*) along with or in default of the male issue. The widow of an adopted son suing her father-in-law for partition after he has made a second adoption is entitled to a third and not to a half share (*x*). Similarly the widow of a predeceased son and the widow of a predeceased son of a predeceased son are entiled to succeed for their respective shares (*y*). For instance a predeceased son's widow takes before a mother under the Act (*z*). S. 35

The interest thus taken by the widow in the joint family property, as well as the interest devolving on the three female heirs, is under sub-section *3* the limited interest technically known as a Hindu Woman's Estate. Although section 2 provides that section 3 shall apply when a Hindu dies intestate, it is submitted that the provisions of sec. 3 (*2*) are intended to apply to every Hindu joint family. The Act is silent as to what is to happen to the interest thus taken when the heir in question dies but presumably it will devolve according to the ordinary law. (See secs. 43 and 128.) The statute was

(*u*) *Jadaobai* v. *Puranmal* (1944) Nag. 832; dissenting from *Natarajan Chettiar* v. *Perumal Ammal* ('42) A.M. 246.

(*v*) *Siveshwar Prasad* v. *Lala Har Narain* (1944) 23 Pat. 760, ('42) A.P. 212.

(*w*) *Nand Kumari Devi* v. *Bulkan Devi* (1944) 23 Pat. 508.

(*x*) *Chinniah Chettiar* v. *Sivagami Achi* (1945) Mad. 402.

(*y*) *Saradambal* v. *S. Subbarai Ayyar* (1942) Mad. 630, 201 I.C. 152. ('40) A. M. 212.

(*z*) *Bhagvan Devi* v. *Jai Devi* (1944) All. 401.

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enacted to enlarge the rights of women, or as it says to give better rights to them and there is no indication that, except for this limited purpose, the Legislature intended to interfere with the established law relating to succession or to a joint family. The provision that the widow of a member of a joint family is to have the same interest in the joint property as her deceased husband, and further the provision that she is entitled to claim partition, would seem to indicate that mere devolution of the husband's interest would not otherwise affect the joint family status as such, or to confer upon the widow all the rights of a male coparcener other than those necessary for enforcing the rights expressly conferred on her. However, for purposes of income-tax assessment the widow is regarded as a member of the joint family (*a*). It has been held in Madras that a trusteeship is not "separate property" within the meaning of the Act, and therefore devolves only on the widow and not on a son's widow. The Act applies to moveable properties in foreign countries (*b*).

Whether Act ultra vires.—The Hindu Women's Rights To Property Act of 1937 and Amending Act of 1938 do not operate to regulate succession to agricultural land in the Governor's Provinces, or to a mortgagee's interest or a lessee's interest (*c*) in such lands but are not *ultra vires* as to other lands (*d*).

A mango grove is agricultural land within the meaning of Sch. VII, Govt. of India Act (1935), lists II and III (*e*).

36. Propinquity the governing factor.—Under the Mitakshara, the right to inherit arises from propinquity, that is, proximity of relationship (*f*). Under the Dayabhaga, it

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(*a*) *The Commissioner of Income-tax* v. *A.V.P. Mr. M. Lakshmanan Chettiar* (1941) Mad. 104.

(*b*) *Umanal Achi* v. *Lakshmi Achi* (1945) F.C.R. 1.

(*c*) *Kotayya* v. *Annapurnamma* (1945) Mad. 777; *Ramaswami* v. *Murugayyan* (1945) Mad. 789.

(*d*) In re the Hindu women's rights to property act of 1937 and the Hindu women's rights to property amendment act of 1938 and In re a special reference under sec. 213 of the Government of India Act 1935 (1941) F.C.R. 12; *Anant Lal* v. *Ram Adhar* 17 Luck. 720, 198 I.C. 443, 42 A.O. 216.

(*e*) *Sarojini Devi* v. *Subrahmanyam* (1945) Mad. 61.

(*f*) *Lallubhai* v. *Cassibai* (1881) 5 Bom. 110, 121, 7 I.A. 212, 234; *Adit Narayan* v. *Mahabir Prasad* (1921) 48 I. A. 86, 95, 6 Pat. L. J. 140, 60 I. C. 251, ('21) A. PC. 53; *Vedachela* v. *Subramania* (1921) 48 I.A. 349, 359, 44 Mad. 753, 64 I. C. 402, ('22) A. PC. 33; *Parot Bapalal* v. *Mehta Harilal* (1895) 19 Bom. 631; *Babu Lal* v. *Nanku Ram* (1895) 22 Cal. 339; *Suba Singh* v. *Sarafraz* (1897) 19 All. 215 [F.B.]; *Subramanya* v. *Siva Subramanya* (1894) 17 Mad. 316: *Appandai* v. *Bagubali* (1910) 33 Mad. 439, 444, 5 I. C. 280; *Chinnasami* v. *Kunju Pillai* (1912) 53 Mad. 152, 11 I. C. 885.

arises from spiritual efficacy, that is, the capacity for conferring spiritual benefit on the manes of paternal and maternal ancestors [s. 79]. But though under the Mitakshara the right to inherit does not arise from the right to offer oblations, the test to be applied, when a question of *preference* arises, is, in the case of sagotra sapindas, the capacity to offer oblations (*g*), but, in the case of bhinna-gotra sapindas, the " primary test " is " propinquity in blood " (*h*) and, " when the degree of blood relationship furnishes no certain guide," the test is the capacity for conferring spiritual benefit (*i*). Ss. 36, 37

Different meanings of " sapinda " in the Mitakshara and the Dayabhaga.—In *Buddha Singh* v. *Lallu Singh* (*j*), their Lordships of the Privy Council said: " It is now well settled by the decisions of this Board [*Lallubhai Bappoobhoy* v. *Cassibai* (*k*) and *Ramchandra*'s case (*l*)], that under the Mitakshara the sapinda-relationship arises 'between two people through their being connected by particles of one body,' namely, that of the common ancestor, in other words, from community of blood in contradistinction to the Dayabhaga notion of 'community in the offering of religious oblations.' "

Both the schools adopt as the starting point the text of Manu, " To the nearest sapinda, the inheritance next belongs." Vijnaneshwara, the author of the Mitakshara, who flourished towards the end of the eleventh and the beginning of the twelfth century, laid down that sapinda-relationship arose from community of blood, or, to use the quaint language of Hindu writers, " community of particles of the same body." On the other hand, Jimuta Vahana, the author of the Dayabhaga, who came about five centuries later laid down that sapinda-relationship arose from " community in the offering of funeral oblations " (*m*). A sapinda, according to the Mitakshara, means a person connected by the same *pinda* or particles of the same body; according to the Dayabhaga, it means a person connected by the same *pinda* or funeral cake. It may happen that, in some instances, the same person is the preferential heir whichever test is applied.

The doctrine of spiritual benefit is explained in secs. 79 to 87.

37. Gotraja sapindas and bhinna-gotra sapindas.—(*1*) The Mitakshara divides sapindas or blood relations into two classes, namely :—

(a) gotraja sapindas, that is, sapindas belonging to the same *gotra* or family as the deceased ; and

(*g*) *Bhyah Ram Singh* v. *Bhyah Ugur Singh* (1872) 13 M.I.A. 373, 392; *Buddha Singh* v. *Laltu Singh* (1915) 42 I. A. 208, 217, 227, 228, 37 All. 604, 613, 623, 624, 30 I. C. 5, ('15) A.PC. 70.

(*h*) *Balasubramanya Pandya Thalaivar* v. *Subbyya Thevar* (1938) 65 I. A. 93 (1938) Mad. 559, 40 Bom. L. R. 704, 172 I. C. 724, ('38) A. PC. 34.

(*i*) *Veduchela* v. *Subramania* (1921) 48 I. A. 349, 44 Mad. 753, 64 I. C. 402, ('22) A.PC. 33; *Jotindra Nath Roy* v. *Nagendra Nath Roy* (1931) 58 I.A. 372, 59 Cal. 576, 135 I.C. 637, ('31) A.PC. 268; *Ademma* v. *Hanuma Reddi* (1938) Mad. 260 ('37) A. M. 967.

(*j*) (1915) 42 I.A. 208, 217, 37 All. 604, 613, 30 I.C. 529, ('15) A.PC. 70.

(*k*) (1880) 5 Bom. 110, 121, 7 I.A. 212, 234.

(*l*) *Ramchandra* v. *Vinayak* (1914) 41 I.A. 290, 298, 42 Cal. 384, 404, 25 I.C. 290, ('14) A.PC. 1.

(*m*) *Ibid.*

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(b) bhinna-gotra sapindas, that is, sapindas belonging to a different *gotra* or family from the deceased.

Gotraja sapindas are all agnates, that is, persons connected with the deceased by an unbroken line of male descent, as for instance, a son's son, a son's son's son, or a brother's son. If challenged, the identity of gotra (*n*) and the continuity of the lineage, not broken by an adoption into another gotra (*o*) must be established. Bhinna-gotra sapindas are all cognates, that is, persons related to the deceased through a female such as a sister's son, a brother's daughter's son, etc. Bhinna-gotra sapindas are called bandhus in the Mitakshara, and are commonly known by that name.

(*2*) Gotraja sapindas are sub-divided into two classes, namely, (1) sapindas technically so called, and (2) samanodakas.

(*3*) It will be seen from the above that the word "sapinda" is used in the Mitakshara in two senses. In its larger sense it means a person having the same pinda or community of particles of the same body with the deceased, that is, a blood relation. In its narrower sense, the sapindaship ceases with the fifth degree on the mother's side and the seventh degree on the father's side. That is, a person is said to be the sapinda of another if, when he is related through his father, he is not more than seven degrees from the common ancestor, and when related through the mother not more than five degrees from the common ancestor (*p*). In this sense, as there are no females in the pedigree of a gotraja sapinda, the sapindas include blood relations to the seventh degree only reckoned from and inclusive of the deceased as defined in sec. 39. In the following sections of this chapter the word "sapinda" is used in its narrower sense.

(*n*) *Jadunath Kuar* v. *Bishesher Baksh Singh* (1932) 59 I.A. 173, 36 C.W.N. 1073, 136 I.C. 747, ('32) A.PC. 142.

(*o*) *Lal Hari Har Pratap Baksh Singh* v. *Raja Bajrang Bahadur Singh* (1933) 9 Luck. 121, 144 I.C. 529, ('33) A.O. 197.

(*p*) Mitakshara, chap. III, v. 53, quoted in *Ramchandra* v. *Vinayak* (1914) 41 I.A. 290, 42 Cal. 384, 408, 25 I.C. 290, ('14) A. PC. 1.

38. The three classes of heirs.—(*1*) There are three classes of heirs recognized by the Mitakshara, namely :— Ss. 38, 39

(a) Gotraja sapindas ;

(b) samanodakas ; and

(c) bandhus.

(*2*) The first class succeeds before the second, and the second succeeds before the third.

39. Gotraja Sapindas.—The gotraja sapindas of a person, according to the Mitakshara (*q*), are—

(*i*) his 6 male descendants in the male line ;

that is, his son, son's son, son's son's son, etc., being S_1 to S_6 in the table given on p. 34 below.

(*ii*) his 6 male ascendants in the male line, the wives of the first three of them, and probably also of the next three ;

that is, his father, father's father, father's father's father, etc., being F_1 to F_6 in the table and their wives, that is, M_1 to M_6 being the mother, father's mother, father's father's mother, etc.

(*iii*) the 6 male descendants in the collateral male line of each of his six male ascendants ;

(1) that is, x_1 to x_6 in the line of F_1, being his brother, brother's son, brother's son's son, etc. ;

(2) x_1 to x_6 in the line of F_2, being his paternal uncle, paternal uncle's son, etc.;

(3) x_1 to x_6 in the line of F_3, being his paternal grand-uncle, paternal grand-uncle's son, etc. ;

(4) x_1 to x_6 in the line of F_4;

(5) x_1 to x_6 in the line of F_5 ; and

(6) x_1 to x_6 in the line of F_6.

(*q*) Sarkar's Hindu Law, 7th ed., p. 97; Sarvadhikari's "Principles of Hindu Law of Inheritance," 2nd ed., p. 503 ; *Bhyah Ram* v. *Bhyah Ugur* (1870) 13 M.I.A. 373, 394.

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(*iv*) his wife, daughter, and daughter's son.

The sapindas are 57 in number as shown below :—

S_1 to S_6	6
F_1 to F_6 and their wives M_1 to M_6	12
x_1 to x_6 in each of the six lines from F_1 to F_6	36
Wife, daughter and daughter's son	3
	57

It will be seen that the sapinda relationship extends to seven degrees reckoned from and *inclusive* of the deceased, this being the Hindu mode of counting degrees. It is six degrees, if you exclude the deceased. The wife becomes a sapinda of the husband on marriage. The daughter's son is not a gotraja sapinda : he is a bandhu for he is related to the deceased through a female. For the purposes of succession, however, he is ranked with gotraja sapindas.

A sapinda, according to the Mitakshara, means a person connected with the same *pinda* or body. See sec. 36 above.

In the case of the sons of a prostitute there can be no gotraja sapinda relationship between them or their agnate male descendants as the father is unknown (*r*).

40. Samanodakas.—The sapinda relationship, as stated above, extends to seven degrees reckoned from and inclusive of the deceased. The samanodakas of a person include all his agnates from the 8th to the 14th degree (*s*).

The samanodakas are shown in the table given on p. 34 in thick black type. They are 147 in number counting up to the 14th degree only ; they are :—

S_7 to S_{13} in the descending line	7
F_7 to F_{13} in the ascending line	7
x_7 to x_{13} in each of six collateral lines from F_1 to F_6	$7 \times 6 = 42$
x_1 to x_{13} in each of the 7 collateral lines from F_7 to F_{13}	$13 \times 7 = 91$
	147

Samanodakas are those male relations of a Hindu to whom he offers oblations of *water* while performing the *Sradha* ceremony. See sec. 80.

41. Table of Gotraja sapindas and samanodakas.—The table given on p. 34 is a table of Gotraja sapindas and samanodakas (*t*).

The thick black lines show where the sapinda relationship ends, and the samanodaka relationship begins.

(*r*) *Krishna Mudaliar* v. *Marimuthu Mudaliar & Ors.* (1940) Mad. 109 ('39) A.M. 862, (1939) 2 M.L.J. 423, 13 I.R. 298.

(*s*) *Atmaram* v. *Bajirao* (1935) 62 I.A. 139, 155 I.C. 330, ('35) A.PC. 57, approving *Naraini* v. *Chandi* (1887) 9 All. 467 ; *Ramu Row* v. *Kuttiya* (1917) 40 Mad. 654, 659, 34 I.C. 294, ('17) A.M. 872 and disapproving *Devkore* v. *Amritram* (1885) 10 Bom. 372; *Ram Baran* v. *Kamla Parsad* (1910) 32 All. 594, 6 I.C. 698.

(*t*) This table is an enlargement of the table given in Sarvadhikari's "Principles of the Hindu Law of Inheritance," 2nd ed., p. 527.

The samanodakas are shown in thick black type ; the rest are sapindas.

W is the widow of the deceased owner, *d* is his daughter and *d's son* is his daughter's son.

S_1 to S_{13} are the son, the son's son, the son's son's son, etc., of the deceased.

F_1 to F_{13} are his father, father's father, father's father's father, etc.

M_1 to M_6 are his mother, father's mother, father's father's mother, etc.

x_1 to x_{13} in the line of F_1 are his brother, brother's son, brother's son's son, etc.

x_1 to x_{13} in the line of F_2 are his paternal uncle, paternal uncle's son, paternal uncle's son's son, etc.

x_1 to x_{13} in the line of F_3 are his paternal grand-uncle, paternal grand-uncle's son, etc., and so on in the remaining lines from F_4 to F_{13}.

The table does not include female heirs recognised in the Bombay Presidency.

F_1 to F_{13} is the ascending line ; S_1 to S_{13} is the descending line ; x_1 to x_{13} are the thirteen collateral lines.

42. Succession in the Bombay Presidency.—The rules of inheritance in force in the Bombay Presidency differ in some respects from those in force in the Benares, Mithila and Madras schools. Again in those parts of the Bombay Presidency where the Mayukha is the prevailing authority, that is, the island of Bombay, Gujarat and the North Konkan, the rules of inheritance are in some respects different from those prevailing in other parts of that Presidency. The order of succession in the Bombay Presidency is given separately in Chapter VI (secs. 71-77).

Table of Sapindas and Samanodakas according to the Mitakshara Law.

$\mathbf{F_{13}}$ .. $\mathbf{X_1}$ **to** $\mathbf{X_{13}}$
|
$\mathbf{F_{12}}$ .. $\mathbf{X_1}$ **to** $\mathbf{X_{13}}$
|
$\mathbf{F_{11}}$ .. $\mathbf{X_1}$ **to** $\mathbf{X_{13}}$
|
$\mathbf{F_{10}}$ .. $\mathbf{X_1}$ **to** $\mathbf{X_{13}}$
|
$\mathbf{F_9}$ .. $\mathbf{X_1}$ **to** $\mathbf{X_{13}}$
|
$\mathbf{F_8}$ .. $\mathbf{X_1}$ **to** $\mathbf{X_{13}}$
|
$\mathbf{F_7}$ .. $\mathbf{X_1}$ **to** $\mathbf{X_{13}}$

M_6 — F_6 — x_1 — x_2 — x_3 — x_4 — x_5 — x_6 —— $\mathbf{X_7}$ **to** $\mathbf{X_{13}}$
|
M_5 = F_5 — x_1 — x_2 — x_3 — x_4 — x_5 — x_6 —— $\mathbf{X_7}$ **to** $\mathbf{X_{13}}$
|
M_4 = F_4 — x_1 — x_2 — x_3 — x_4 — x_5 — x_6 —— $\mathbf{X_7}$ **to** $\mathbf{X_{13}}$
|
M_3 = F_3 — x_1 — x_2 — x_3 — x_4 — x_5 — x_6 —— $\mathbf{X_7}$ **to** $\mathbf{X_{13}}$
|
M_2 = F_2 — x_1 — x_2 — x_3 — x_4 — x_5 — x_6 —— $\mathbf{X_7}$ **to** $\mathbf{X_{13}}$
|
M_1 = F_1 — x_1 — x_2 — x_3 — x_4 — x_5 — x_6 —— $\mathbf{X_7}$ **to** $\mathbf{X_{13}}$

W = *OWNER.*

W	*OWNER*
d	S_1
d's son	S_2
	S_3
	S_4
	S_5
	S_6
	$\mathbf{S_7}$ **to** $\mathbf{S_{13}}$

Note.—For explanation of the table, see sec. 41.

43. Order of succession among sapindas.—The sapindas succeed in the following order:— **S. 43**

1—3. **Son, grandson (son's son), and great-grandson (son's son's son), and (after 14th April 1937) widow, predeceased son's widow, and predeceased son's predeceased son's widow.**—A son, a grandson whose father is dead, and a great-grandson whose father and grandfather are both dead, succeed *simultaneously* as a *single* heir to the separate or self-acquired property of the deceased with rights of survivorship (*u*). See s. 29, s. 31, ill. (a), and s. 32.

After 14th April 1937, a widow takes the same share as a son. The widow of a predeceased son inherits in like manner as a son if there is no son surviving of such predeceased son; and in like manner as a son's son, if there is surviving a son or son's son of such predeceased son. The same rule applies *mutatis mutandis* to the widow of a predeceased son of a predeceased son.

(1) *Take per stirpes.*—The son, grandson and great-grandson take *per stirpes* and not *per capita*. See s. 29 and illustration thereto.

(2) *Son born after partition.*—Where there has been a partition between a father and his sons, and a son is subsequently born to him, such son takes not only the share of the father in the joint property obtained by him on partition, but the whole of the property acquired by the father before or after partition to the exclusion of the divided sons (*v*). *A* and his two sons, *B* and *C*, constitute together a joint family. *B* and *C* separate from *A*. After the division a son *D* is born to *A*. *A* and *D* remain joint. *A* then dies leaving *D*. *D* is entitled not only to *A*'s separated share of the joint property, but to the whole of *A*'s self-acquired property. See s. 310.

(3) *Divided and undivided sons.*—Where there are sons by different wives, it often happens that the sons by one wife take their share of the joint property from the father and separate from him, and the father continues joint with the sons by his other wife. Suppose now that the father dies leaving self-acquired property, some acquired before and some after partition. Who is entitled to the property? According to the Allahabad, Bombay and Madras ruling (*w*), the undivided sons and their branches succeed as heirs to the whole of such property to the exclusion of the divided sons and their branches. According to the Oudh rulings, they all inherit together, the reason given being that partition does not destroy rights of inheritance to the self-acquired property of a separated member (*x*). *A* and his two sons *B* and *C* constitute a joint family. *B* separates from *A*, and receives his share of the joint property. *A* then dies leaving self-acquired property. Both *B* and *C* survive *A*. According to the Bombay and Madras decisions, *C* alone is entitled to such property. According to the Oudh decisions, *B* and *C* inherit the property in equal shares. See s. 341.

(*u*) *Marudadi* v. *Doraisami* (1907) 30 Mad. 348; *Gangadhar* v. *Ibrahim* (1923) 47 Bom. 556, 72 I. C. 307, ('23) A. B. 265.

(*v*) *Nawal Singh* v. *Bhagwan Singh* (1882) 4 All. 427, 429.

(*w*) *Fakirappa* v. *Yellappa* (1898) 22 Bom. 101; *Nana* v. *Ramchandra* (1909) 32 Mad. 377, 2 I.C. 519; *Vairavan* v. *Srinivasachariar* (1921) 44 Mad. 499, 503-504, 62 I.C. 944, ('21) A.M. 168 [F.B.]; *Narasimhan* v. *Narasimhan* (1932) 55 Mad. 856, 137 I. C. 765, ('32) A. M. 361; *Ganesh Prasad* v. *Hazari Lal* (1942) All. 759, 202 I. C. 350, ('42) A. A. 201.

(*x*) *Badri Nath* v. *Hardeo* (1930) 5 Luck. 649, 123 I.C. 861, ('30) A. O. 77. [The case of *Kunwar Bahadur* v. *Madho Prasad* (1918) 17 All. L. J. 151, 49 I. C. 620, ('19) A. A. 223, relied upon in *Badri Nath*'s case, does not support the decision in that case]; *Ambika* v. *Jamuna Prasad* (1942) 17 Luck.

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(4) *Illegitimate sons.*—The illegitimate sons of a Brahman, Kshatriya, or Vaisya are entitled to maintenance, and not to any share of the inheritance (*y*). See Mitakshara, ch. I, s. 12, v. 3.

The illegitimate son of a Sudra, however, is entitled to a share of the inheritance *provided* (1) he is the son (*putra*) of a *dasi*, that is, a Hindu (*z*) concubine in the continuous and exclusive keeping of his father *and* (2) he is not the fruit of an adulterous or incestuous intercourse (*a*). A Brahmin mistress of a Sudra does not become a Sudra herself and their son is not a Dasiputra (*b*). It is not necessary to constitute a woman a *dasi* that she should not have been a married woman (*c*). She may be a widow when the illicit connection begins (*d*), or she may even be a married woman when such connection begins, provided that in the latter case the connection has ceased to be adulterous when the son is conceived, as where the husband dies before conception (*e*). The condition that the connection should not be adulterous or incestuous is not to be found in the texts; it seems to have been imposed on grounds of general morality (*f*). Nor is it necessary that a marriage could have taken place between the boy's father and his mother (*g*). He is not, however, entitled to full rights of inheritance. The text of the Mitakshara bearing on the subject is as follows:—

"The son begotten by a Sudra on a female slave obtains a share by the father's choice or at his pleasure. But after [the demise of] the father, if there be sons of a wedded wife, let these brothers allow the son of the female slave to participate *for half a share*; that is, let them give him half [as much as is the amount of one brother's] allotment": Mitakshara, chap. I, sec. 12, verse 2.

The above text refers to the property of a *separated* householder (*h*).

In *Kamulammal* v. *Visvanathaswami* (*i*), the above text was interpreted by the Privy Council to mean that an illegitimate son takes one-half of what he *would have taken* if he were legitimate, that is to say, the illegitimate son takes one-fourth ($1/2 \times 1/2$), and the legitimate son takes three-fourths. If he dies leaving one legitimate son and 6 illegitimate sons, then

(*y*) *Roshan Singh* v. *Balwant Singh* (1900) 22 All. 191, 27 I.A. 51; *Chuoturya* v. *Sahub Purhulad* (1857) 7 M.I.A. 18; *Hiralal Laxmandas* v. *Meghraj Bhikchand* (1938) Bom. 779, ('38) A. B. 433.

(*z*) *Lingappa* v. *Esudasan* (1904) 27 Mad. 13 [a Christian woman is not a *dasi*]; *Sitaram* v. *Ganpat* (1923) 25 Bom. L. R. 429, 73 I. C. 412, ('23) A. B. 384 [a Mahomedan woman is not a *dasi*]; *Mahabir Prasad* v. *Raj Bahadur Singh* (1943) 18 Luck. 585 (Thakur woman).

(*a*) *Rahi* v. *Govinda* (1876) 1 Bom. 97; *Sadu* v. *Baiza* (1880) 4 Bom. 37; *Gangabai* v. *Bandu* (1916) 40 Bom. 369, 32 I. C. 986, ('16) A. B. 283; *Ram Kali* v. *Jamma* (1908) 30 All. 508; *Rajani Nath Das* v. *Nitai Chandra Dey* (1921) 48 Cal. 643, 63 I. C. 50, ('21) A.C. 820 [F. B.] overruling *Narain* v. *Rakhal* (1876) 1 Cal. 1; *Kirpal* v. *Sukurmoni* (1892) 19 Cal. 91, and *Ram Sarain* v. *Tekchand* (1901) 28 Cal. 194. See *Bai Nagubai* v. *Bai Monghibai* (1926) 53 I. A. 153, 50 Bom. 604, 96 I.C. 20, ('26) A. PC. 73 [on appeal from (1923) 47 Bom. 401, 69 I.C. 291, ('23) A. B. 130]. The illegitimate son of a Sudra who is the offspring of an adulterous or incestuous intercourse is entitled to maintenance only [s. 551].

(*b*) *Ramchandra Doddappa* v. *Hanam Naik Dodnaik* (1936) 60 Bom. 75, 37 Bom. L. R. 920, 160 I. C. 99, ('36) A. B. 1.

(*c*) (1876) 1 Bom. 97, *supra*; *Subramania* v. *Rathnavelu* (1918) 41 Mad. 44, 47, 42 I. C. 556, ('18) A. M. 1346.

(*d*) (1916) 40 Bom. 369, 32 I. C. 986, ('16) A. B. 283, *supra*.

(*e*) *Tukaram* v. *Dinkar* (1931) 33 Bom. L. R. 289, 131 I. C. 883, ('31) A. B. 221; *Mt. Daulat Kuar* v. *Bishundeo Singh* (1940) 19 Pat. 382, 189 I. C. 883, ('40) A. P. 310.

(*f*) *Soundararajan* v. *Arunachalam* (1916) 39 Mad. 136, 151, 33 I.C. 858, ('16) A. M. 1170 [F. B.].

(*g*) (1916) 39 Mad. 136, 33 I. C. 858, ('16) A. M. 1170 [F. B.], *supra*; *Rajani Nath Das* v. *Nitai Chandra Dey* (1921) 48 Cal. 643, 63 I. C. 50, ('22) A. C. 820 [F. B.].

(*h*) *Ranoji* v. *Kandoji* (1885) 8 Mad. 457, 561.

(*i*) (1923) 50 I. A. 32, 46 Mad. 167, 71 I. C. 643, ('23) A. PC. 8 disapproving; *Kesaree* v. *Samardhan* (1873) 5 N. W. P. 9; *Chellammal* v. *Ranganatham* (1911) 34 Mad. 277, 12 I. C. 247; (1916) 40 Bom. 369, 32 I. C. 986, ('16) A. B. 283, *supra*.

if the 6 illegitimate sons were legitimate, they would each take 1/7; being illegitimate, each of them will take 1/2 of 1/7, that is, 1/14 and the six together will take 3/7, and the remaining 4/7 will go to the legitimate son (j). **S. 43**

Where there is no legitimate son, but a daughter or daughter's son, the illegitimate son, takes one-half of the whole estate, and the other half goes to the daughter, or to the daughter's son, as the case may be (k). According to the Privy Council decision in *Kamulammal's* case referred to above, the half share which an illegitimate son takes is a half of that which he would have taken had he been legitimate. Applying that test, it is clear that had the illegitimate son been legitimate, he would have taken the *whole* estate to the exclusion of the daughter; being illegitimate, he takes one-half of the whole, and the daughter or daughter's son, as the case may be, takes the other half. In such a case, if the daughter (who has taken a half share of the estate) dies, the half share descends solely to the daughter's son and the illegitimate son is not entitled to any portion thereof (l). If there be no widow, daughter, or daughter's son, the illegitimate son takes the whole estate (m). An adopted son stands on the same footing as a legitimate son (n).

The share allotted to the illegitimate son under the Mitakshara is not in lieu of maintenance; it is in recognition of his status as a *son* (o).

The legitimate son and the illegitimate son inherit their father's property as *coparceners* with a right of *survivorship*. Thus if a Sudra dies leaving a legitimate son *A*, and an illegitimate son *B*, and *A* dies *before* partition without leaving male issue, *B* will take *A*'s share by *survivorship* to the exclusion of *A*'s daughter, mother or other heir (p). See sec. 312.

The right of an illegitimate son of a Sudra to inherit to his father is *not merely a personal right*: it passes on his death to his *legitimate* issue. Thus if a Sudra *A* has a legitimate son *B* and an illegitimate son *C* and *C* predeceases *A*, leaving a legitimate son *D*, then, on *A*'s death, *D* will take a moiety of the share of *B*, that is, *B* will take 3/4, and *D* will take 1/4; that being the share of his father *C*. It is an open question whether *D* would inherit at all to *A*, if he were the *illegitimate* son of *C* (q).

Where, on partition between a legitimate son and an illegitimate son, property is allotted to the widow, the illegitimate son can claim, on the widow's death, a share in the property allotted to her, as it stands on the same footing as property inherited from her husband (r).

The illegitimate son of a Sudra inherits only to his father; he has no claim to inherit to *collaterals*. Thus if a Sudra dies leaving a legitimate son *A* and an illegitimate son *B*, they will both inherit their father's property as copar-

(j) *Maharaja of Kolhapur* v. *Sundaram* (1925) 48 Mad. 1, 93 I.C. 705, (25) A. M. 497.

(k) *Shesgiri* v. *Girewa* (1890) 14 Bom. 282; *Meenakshi* v. *Appakutti* (1910) 33 Mad. 226, 4 I. C. 299; *Annayyan* v. *Chinnan* (1910) 33 Mad. 366, 5 I. C. 84.

(l) *Karuppayee* v. *Ramaswami* (1932) 55 Mad. 856, 137 I.C. 645, ('32) A.M. 440.

(m) *Sarasvati* v. *Mannu* (1879) 2 All. 134, Mitakshara, chap. 1, sec. 12, para. 1.

(n) *Maharaja of Kolhapur* v. *Sundaram* (1925) 48 Mad. 1, 93 I. C. 705, ('25) A.M. 497.

(o) *Velluiyappa Chetty* v. *Natarajan* (1931) 55 Mad. 1, 58 I.A. 402, 134 I.C. 1084, ('31) A. PC. 294.

(p) *Raja Jogendra* v. *Nityanund* (1891) 18 Cal. 151, 17 I.A. 128, [on app. from (1885) 11 Cal. 702], approving *Sadu* v. *Baiza* (1880) 4 Bom. 37.

(q) *Ramalinga* v. *Pavadai* (1902) 25 Mad. 519, 524.

(r) *Bhagwantrao* v. *Punjaram* (1938) Nag. 255, 174 I. C. 201, ('38) A. N. 1.

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ceners. If they divide the property, *A* will take 3/4 and *B* will take 1/4. If *A* dies *after* partition, his share will pass to his own heirs, *but in no case to B*, *B* not being amongst his heirs. *B* can inherit to his father alone, and not to his father's legitimate sons, nor his father's brothers nor any other collaterals (*s*). If *A* dies while he is *joint* with *B* without leaving male issue his share would go to *B* by *survivorship*. But *A*'s separate property would pass to his own heirs, and not in any case to *B*. On the same principle, if a Sudra dies leaving an illegitimate son of his father and a half-brother, the half-brother is entitled to succeed, the illegitimate son being excluded from all collateral succession (*t*). And just as an illegitimate son is not entitled to inherit to collaterals, so a collateral is not entitled to inherit to him. Thus if a Sudra dies leaving a legitimate son *A* and an illegitimate son *B*, and *A* dies leaving a legitimate son *C*, and *B* dies without leaving any relations, *C*, who is a collateral, is not entitled to succeed to *B*'s property (*u*).

The son of a Zamindar born of the *katar* form of marriage among the Tanwars or Kanwars (Sudra) is illegitimate and is not entitled to the Zamindary in preference to the Zamindar's cousin (*v*). The only question raised before the Judicial Committee was as to the validity of the marriage. The other point was conceded obviously because the Zamindari was impartible and the cousin took by survivorship. (See s. 587.)

The illegitimate son is not entitled to succeed to the stridhan of his father's wife (*w*).

There can be no coparcenary between a Sudra father and his illegitimate sons. But it has been held by the High Court of Bombay that *on the father's death* they hold the property inherited by them from him as coparceners and none of them can dispose of his interest in it by will (*x*).

(5) *Son born of anuloma marriage.*—Under the Hindu law as administered in the Bombay Presidency, the marriage of a Brahman male with a Sudra, woman is an *anuloma* marriage and is valid. A son born of such a marriage is legitimate, but he is entitled only to a one-tenth share in the estate of his father. As regards the estate of his uncle also, he is entitled not to the whole of it, but only to a one-tenth share in it (*y*).

4. Widow.

(1) *Widow's estate.*—The widow takes only a limited interest called the *widow's estate* in the estate of her husband [s. 176]. On her death the estate goes not to her heirs, but to the next heirs of her husband, technically called reversioners (*z*) [ss. 168, 170]. She is entitled only to the income of the property inherited by her. She has no power to dispose of the *corpus* of the property except in certain cases [ss. 178-180]. She may, however, alienate her life-interest in the estate.

(*s*) *Shome Shankar* v. *Rajesar* (1899) 21 All. 99; *Subramania* v. *Rathnavelu* (1918) 41 Mad. 44, 42 I.C. 556, ('18) A. M. 1346 [F. B.]; *Ayiswaryanandaji* v. *Sivaji* (1926) 49 Mad. 116, 92 I. C. 928, ('26) A. M. 84; *Raj Fateh Singh* v. *Baldeo Singh* (1928) 3 Luck. 416, 109 I. C. 310, ('28) A. O. 233.

(*t*) *Dharma* v. *Sakharam* (1920) 44 Bom. 185, 55 I. C. 306, ('20) A. B. 205.

(*u*) *Zipru* v. *Bomtya* (1922) 46 Bom. 424, 64 I. C. 975, ('22) A. B. 176.

(*v*) *Ram Sarun Singh* v *Mahabir Sewak Singh* (1934) 61 I. A. 106, 147 I. C. 667, ('34) A. PC. 74.

(*w*) *Ayiswaryanandaji* v. *Sivaji* (1926) 49 Mad. 116, 92 I. C. 928, ('26) A. M. 84.

(*x*) *Shamu* v. *Babu Aba* (1928) 52 Bom. 300. 110 I.C. 116, ('28) A.B. 153. See *ParKrisawmy* v. *Dorasawmy* (1931) 9 Rang. 266, 271, 272, 132 I.C. 817, ('31) A.R. 216.

(*y*) *Natha* v. *Mehta Chhotalal* (1931) 55 Bom. 1, 130 I.C. 17, ('31) A.B. 89.

(*z*) *Bhugwandeen* v. *Myna Baee* (1867) 11 M. I.A. 487.

(2) *Unchastity.*—An unchaste widow is not entitled to inherit to her husband. But once the husband's estate has vested in her (which can only happen if she was chaste at the time of her husband's death), it will not be divested by unchastity *subsequent* to her husband's death (*a*). **S. 43**

(3) *Re-marriage.*—The re-marriage of a widow, though now legalized by the Hindu Widow's Re-marriage Act, 1856, divests the estate inherited by her from her deceased husband. By her second marriage she forfeits the interests taken by her in her husband's estate, and it passes to the next heirs of her husband as if she were dead (s. 2 of the Act). The reason is that a widow succeeds as the surviving half of her husband, and she ceases to be so on re-marriage. But a widow does not by re-marriage lose her right to succeed to the estate of her son (*b*) or her daughter (*c*), by her first husband.

Does a Hindu widow who has *ceased* to be a Hindu before her re-marriage, *e.g.*, by conversion to Mahomedanism, forfeit her rights to her husband's property? Yes, according to the Calcutta (*d*), Madras (*e*), Bombay (*f*), and Patna (*g*) decisions. No, according to the Allahabad decisions (*h*).

There is a conflict of opinion as to whether a widow who is entitled to re-marry by the *custom of the caste* to which she belongs, forfeits her interest in her husband's estate by re-marriage. It has been held by the High Court of Allahabad and the Chief Court of Oudh, that she does not; by the other High Courts, that she does. The Allahabad High Court has again considered the matter in a Full Bench and held that she does not, unless it is proved that there is also a custom of such forfeiture on such a contingency (*i*). See the cases cited in s. 563 below. The mere fact that there is a practice of re-marriage after 1856 would not necessarily be indicative of any ancient custom existing before the Act and such a custom has to be proved by the party relying on it (*j*).

(4) *Two or more widows.*—Two or more widows succeeding as co-heirs to the estate of their deceased husband take as joint tenants with rights of survivorship and *equal beneficial enjoyment.* Thus is a Hindu dies leaving two widows *A* and *B*, they are entitled as between themselves to an equal share of the income, and on the death of either of them, the other is entitled to the whole of the income by *survivorship.* Though co-widows take as joint tenants no one of them has a right to *enforce* an *absolute partition* of the estate against the others *so as to destroy their right of survivorship.* But they are entitled to obtain a partition of separate portions of the property so that each may, enjoy her equal share of the *income* accruing therefrom, and the Court may, at suit of any one of them pass a decree for *separate possessionand enjoyment.* Each can deal as she pleases with her own *life-interest*, but she cannot alienate any part of the *corpus* of the estate by gift or will so as to prejudice the rights of the survivor or a future reversioner. If they act together

(*a*) *Moniram* v. *Keri Kolitani* (1880) 5 Cal. 776, 7 I.A. 115; *Sellam* v. *Chinnammal* (1901) 24 Mad. 441; *Gangadhar* v. *Yellu* (1912) 36 Bom. 138, 12 I.C. 714.

(*b*) *Akora Suth* v. *Boreani* (1869) 2 Beng. L.R. A.C. 199; *Chamar Haru* v. *Kashi* (1902) 26 Bom. 388; *Basappa* v. *Rayava* (1905) 29 Bom. 91 [F.B.]; *Lakshmana* v. *Siva* (1905) 28 Mad. 425; *Kundan* v. *Secretary of State* (1926) 7 Lah. 543, 96 I.C. 865, ('26) A.L. 637.

(*c*) *Bhiku* v. *Keshav* (1924) 26 Bom. L.R. 235, 80 I.C. 512, ('24) A.B. 360.

(*d*) *Matungini* v. *Ram Rutton* (1892) 19 Cal. 289 [F. B.].

(*e*) *Vitta* v. *Chatakondu* (1918) 41 Mad. 1078, 48 I.C. 50, ('19) A.M. 854 [F.B.].

(*f*) *Raghunath Shanker* v. *Laxmi Bai* (1935) 59 Bom. 417; 37 Bom. L. R. 150, 157 I. C. 658, ('35) A. B. 298.

(*g*) *Mussammat Suraj* v. *Attar* (1922) 1 Pat. 706, 67 I.C. 550, ('22) A.P. 378.

(*h*) *Abdul Aziz* v. *Nirma* (1913) 35 All. 466, 20 I.C. 335.

(*i*) *Bhola Umar* v. *Mt. Kausilla* (1933) 55 All. 24, 140 I.C. 631, ('32) A.A. 617.

(*j*) *Bhola Uma* v. *Kausilla* (1936) 58 All. 1034, 169 I. C. 504, ('37) A. A. 230.

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they can burden the reversion with any debts contracted owing to legal necessity but one of them acting without the authority of the other, cannot prejudice the right of survivorship by burdening or alienating any part of the estate. The mere fact of partition between the two, while it gives each a right to the fruits of the separate estate assigned to her, does not imply a right to prejudice the claim of the survivor to enjoy the full fruits of the property during her lifetime (*k*). But the right of survivorship may be relinquished by *agreement* between the widow. Such an agreement may be effected orally and without a registered instrument (*l*). See s. 181 (C).

Where a Hindu dies leaving *only one widow*, she can alienate her life-interest in the property inherited by her from her husband, but she cannot alienate the *corpus* of the property except for legal necessity. An alienation of the *corpus* except for legal necessity does not bind the next heirs of her husband who succeed to his estate after the widow's death. Thus if a Hindu dies leaving a widow and a brother, and the widow sells or mortgages the *corpus* of the estate without legal necessity, the sale or mortgage binds only her life-interest. On her death, her husband's brother would succeed to the estate as his heir, and he would not be bound by the sale or mortgage, the same having been made without legal necessity (ss. 181-181B, 185).

Where a Hindu dies leaving *two or more widows*, and they are in *joint* possession of the estate, any one of them may alienate her *undivided* interest in her husband's property. If any one of the widows is in possession of a *separate* portion of the property whether it be by mutual agreement between them or under a decree of the Court, she may alienate her *share* of the income which is derived from that portion. But in either case the alienation cannot take effect or have validity *beyond her lifetime*. It is good only for her life, and on her death her interest in the property goes to the co-widow by *survivorship*. She cannot alienate her interest so as to defeat the right of *survivorship* of the co-widow. That can only be done with the *consent* of the co-widow (*m*).

Two or more widows cannot by any agreement between them affect the rights of the ultimate reversioners (*n*).

4A. Predeceased son's widow, widow of predeceased son of predeceased son—

(See S. 35. *supra*.)

5. Daughter.—

(1) *Priority among daughters.*—Daughters do not inherit until all the widows are dead. As between daughters, the inheritance goes, first, to the unmarried daughters (*o*), next, to daughters who are married and "unprovided for," that

(*k*) *Bhugwandeen* v. *Myna Baee* (1867) 11 M. I.A. 487; *Sri Gajapathi Nilamani* v. *Radhamani* (1877) 1 Mad. 290, 4 I.A. 212, followed in *Chhittar* v. *Gaura* (1912) 34 All. 189, 13 I.C. 320; *Mst. Sundar* v. *Parvati* (1889) 12 All. 51, 16 I.A. 186; *Gauri Nath Kakaji* v. *Gaya Kuar* (1928) 55 I.A. 399; 111 I.C. 485, ('28) A. PC. 251; *Appalasuri* v. *Kannamma* (1926) 90 I. C. 881, ('26) A.M. 6; *Mt. Gaya Devi* v. *Mt. Tulsha Devi* (1935) 10 Luck. 587, 154 I. C. 125, ('35) A. O. 296. See also *Jainarayan* v. *Mia* (1933) 12 Pat. 778, 146 I. C. 322, ('33) A. P. 464; *Dulhin Parbati Kuer* v. *Baijnath Prasad* (1935) 14 Pat. 518.

(*l*) *Latchumammal* v. *Gangammal* (1911) 34. Mad. 72, 7 I. C. 858

(*m*) *Bhugwandeen* v. *Myna Baee* (1867) 11 M. I.A. 487; *Hari Narayan* v. *Vitai* (1907) 31 Bom. 560; *Ramakkal* v. *Ramasami* (1899) 22 Mad. 522; *Janoki Nath* v. *Mothuranath* (1883) 9 Cal. 580; *Durga Dat* v. *Gita* (1911) 33 All. 443, 449, 9 I.C. 498; *Nandi* v. *Sarup Lal* (1917) 39 All. 463, 40 I.C. 71 ('17) A. A. 179.

(*n*) *Sri Gajapati* v. *Pusapati* (1893) 16 Mad. 1, 19 I.A. 184; *Mahadevappa* v. *Basagawada* (1904) 29 Bom. 346; *Vadali* v. *Kotipalli* (1903) 26 Mad. 334. See also *Subbammal* v. *Avudaiyammal* (1907) 30 Mad. 3.

(*o*) *Jamnabai* v. *Khimji* (1890) 14 Bom. 1, 13; *Govind* v. *Ram Adhar* (1933) 8 Luck. 182, 140 I.C. 556, ('33) A.O. 31; *Bayava* v. *Parvatava* (1933) 35 Bom. L.R. 118, 144 I.C. 442, ('33) A.B. 126.

is, indigent, and lastly, to daughters who are married and are "enriched," that is, possessed of means (p). A married daughter may be a widow (q). No member of the second class can inherit while any member of the first class is in existence, and no member of the third class can inherit while any member of the first or the second class is in existence.

(2) *Survivorship.*—Two or more daughters of a class take the estate jointly as in the case of widows, with rights of survivorship (r). Any one daughter may alienate her *life-interest* in the property, but not so as to affect the rights of survivorship of the other daughters (s). And, like widows, daughters may enter into any agreement regarding their respective rights in their father's estate, provided such agreement does not prejudice the rights of reversioners (t). They may divide the estate merely with a view to convenient enjoyment, retaining the right of the survivor to take the whole on the death of one of them, or they may agree that the right of survivorship should be extinguished as between themselves (u). The agreement may be effected orally and without a registered writing (v). As to Bombay Presidency, see note (4) below.

(3) *Limited estate.*—The daughter takes a limited interest in the estate of her father corresponding to the widow's estate. On her death, the estate passes not to her heirs, but to the next heirs of her father (w) [see s. 169]. The next heirs of the father are called reversioners. As to Bombay Presidency, see note (4) below.

(4) *In the Bombay Presidency.*—Rules (2) and (3) do not apply in the Bombay Presidency [see s. 72, no. 5]. *A* has two daughters *B* and *C*. *B* has a daughter *D*. On *A*'s death, his estate will go to *B* and *C*. In places other than the Bombay Presidency, they each take a "woman's estate" with rights of survivorship. Therefore, on *B*'s death, her interest in the estate will go, not to her daughter *D*, but to her sister *C* by survivorship. In the Bombay Presidency, however, it is different. There on *A*'s death *B* and *C* will each take an absolute interest in a moiety of the estate so that on *B*'s death, her moiety will go to her heir *D*, and on *C*'s death, her moiety will go to her own heirs.

(5) *Unchastity.*—Unchastity of a daughter is no ground for exclusion from inheritance (x), except that in Bombay, where there is an unmarried daughter who is a prostitute and a married daughter who is chaste, the latter succeeds in preference to the former (y). It may here be observed that under the Mitakshara law, a widow is the only female who is excluded from inheritance by reason of unchastity (z).

(p) *Manki* v. *Kundan* (1925) 47 All. 403, 87 I.C. 121, ('25) A.A. 375; *Totawa* v. *Basawa* (1899) 23 Bom. 229; *Audh Kumari* v. *Chandra Dai* (1879) 2 All. 561; *Danno* v. *Darbo* (1882) 4 All. 243.

(q) *Rajrani* v. *Gomati* (1928) 7 Pat. 820, 111 I.C. 673, ('28) A.P. 466.

(r) *Aumirtolall* v. *Rajoneekant* (1875) 2 I. A. 113, 126, 15 Beng. L. R. 10, 24; *Chhattar Singh* v. *Hukum Kunwar* (1936) 58 All. 391; *Surendranath Basu* v. *Radha Rani Debi* (1940) 2 Cal. 415, 187 I.C. 108, 67 I.A. 129, ('40) A. PC. 45.

(s) *Kanni* v. *Ammakannu* (1900) 23 Mad. 504; *Yelumal Chetty* v. *Natesachari* (1945) Mad. 85.

(t) *Kailash* v. *Kashi* (1897) 24 Cal. 339; *Alamelu* v. *Balu* (1920) 43 Mad. 849, 26 I.C. 455, ('15) A.M. 103.

(u) *Sundarasiva* v. *Viyyamma* (1925) 48 Mad. 933, 91 I.C. 40, ('25) A.M. 1267.

(v) (1920) 43 Mad. 849, 853, 26 I.C. 455, ('15) A.M. 103, *supra*.

(w) *Chotay Lall* v. *Chunnoo Lall* (1879) 4 Cal. 744, 6 I.A. 15; *Mutta* v. *Dora Singa* (1881) 3 Mad. 290, 8 I.A. 99.

(x) *Advyapa* v. *Rudrava* (1880) 4 Bom. 104; *Kojiyadu* v. *Lakshmi* (1882) 5 Mad. 149, 156.

(y) *Tara* v. *Krishna* (1907) 31 Bom. 495; *Govind Bhawshet* v. *Bhike Mahadeoshet* (1945) V.F.C.R. 1.

(z) *Vedammal* v. *Vedanayaga* (1908) 31 Mad. 100.

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(6) *Illegitimate daughter.*—The illegitimate daughter, even of a Sudra, has no rights of inheritance to her father (*a*). But she is entitled to inherit to her mother (*b*). See ss. 163 and 164.

(7) *Exclusion by custom.*—A daughter may be excluded from inheritance by special family or local custom (*c*).

6. Daughter's son.—

(1) *When entitled to succeed.*—The daughter's son is not entitled to succeed if there be any daughter living and capable of inheriting (*d*). A daughter's son is strictly a bandhu or bhinna-gotra sapinda, being related to the deceased through a *female*, but he inherits with gotraja sapindas by virtue of express texts (*e*); see note (5). He succeeds not as an heir to his mother, but as an heir to his own maternal grandfather.

(2) *Takes as full owner.*—The daughter's son takes the estate as full owner like any other male heir, and on his death the succession passes to his heirs and not to the heirs of his maternal grandfather (*f*).

(3) *Take per capita.*—Daughters' sons take *per capita*, not *per stirpes*. *A* has two daughters *B* and *C*. *B* has two sons, and *C* has three. *B* and *C* die in *A*'s lifetime. *A* then dies leaving the five grandsons. The estate will be divided into five shares, each grandson taking one share.

(4) *Where daughter's sons are joint.*—It was held by the Judicial Committee in 1902 that two or more sons by a daughter living as members of a joint family, take the estate inherited by them from their maternal grandfather as joint tenants with rights of survivorship (*g*). It is doubtful how far this remains good law [See S. 223 (2)]. But sons by different daughters would take as tenants-in-common, for there can be no coparcenary between sons by different daughters (*h*). *A* dies leaving two grandsons *C* and *D* by different predeceased daughters, *C* dies leaving a widow. *C*'s interest in the estate will pass to her as his heir, and not to *D* by survivorship.

(5) The daughter's son occupies a peculiar position in the Hindu law. He is a bhinna-gotra sapinda or bandhu, but he comes in before parents and other more remote gotraja sapindas. The reason is that according to the old practice it was competent to a Hindu who had no son to appoint a daughter to raise up issue to him. Such a daughter, no doubt, was the lawful wife of her husband, but her son, called *putrika putra*, became the son of her father. Such a son was equal to an *aurasa* or legitimate son, and took his rank, according to several authorities, as the highest among the secondary sons. Although the practice of appointing a daughter to raise up issue for her father became obsolete, the daughter's son continued to occupy the place that was assigned to him in the order of inheritance and even now he takes a place practically next after the male issue, the widow and the daughters being simply interposed during their respective lives (*i*).

(*a*) *Bhikya* v. *Babu* (1908) 32 Bom. 562.

(*b*) *Arunagiri* v. *Ranganayaki* (1898) 21 Mad. 40.

(*c*) *Bajrangi* v. *Manokarnika* (1908) 30 All. 1, 35 I.A. 1; *Parbati* v. *Chandarpal* (1909) 31 All. 457, 36 I.A. 125, 4 I.C. 25; *Balgobind* v. *Badri Prasad* (1923) 50 I.A. 196, 45 All. 413, 74 I.C. 449, ('23) A. PC. 70; *Raj Bachan Singh* v. *Bhanwar* (1929) 4 Luck. 690, 118 I.C. 760, ('29) A.O. 629.

(*d*) *Baijnath* v. *Mahabir* (1878) 1 All. 608; *San Kumar* v. *Deo Saran* (1886) 8 All. 365.

(*e*) *Srinivasa* v. *Dandayudapani* (1889) 12 Mad. 411.

(*f*) *Mutta* v. *Dorasinga* (1881) 3 Mad. 290, 8 I.A. 99; *Muttuvaduganadha* v. *Periasami* (1896) 19 Mad. 451, 23 I.A. 128.

(*g*) *Raja Venkayyamma* v. *Venkataramanayyamma* (1902) 25 Mad. 678, 29 I.A. 156.

(*h*) *Raja Vythinatha* v *Yeggia* (1904) 27 Mad. 382, 385.

(*i*) In Bombay, the daughter takes not for life, but absolutely.

The difference in his position under the old law and the present law is that under the former he became by a fiction of law a member of his maternal grandfather's family, while under the present law he is a member of his own father's family, but is also regarded as a son's son to his maternal grandfather for purposes of inheritance (j). "In regard to the obsequies of ancestors," says the Mitakshara, "daughter's sons are considered as son's sons": Mit. ch. ii, sec. 2, v. 6. S. 43

(6) If a daughter is excluded from inheritance to her father by custom, her issue also cannot inherit to her father, that is, their maternal grandfather. But this does not prevent them from being the *stridhan* heirs (k). See above, "Daughter," note No. (7).

7. Mother (l).—

(1) *Mayukha Law.*—In cases governed by the Mayukha, the father is preferred to the mother (m).

(2) *Limited interest.*—The mother takes a limited interest in the estate of her son corresponding to the widow's estate. On her death, the estate passes not to her heirs, but to her son's heirs (n).

(3) *Unchastity and remarriage.*—Unchastity of a mother is no bar to her succeeding as heir to her *son*, nor does remarriage constitute any such bar (o).

(4) *Step-mother.*—A step-mother is not entitled to inherit to her step-son (p). In the Bombay Presidency, however, she is an heir, for she is there regarded as a sagotra sapinda (q). See s. 64 below.

(5) *Adoptive mother.*—Mother includes adoptive mother, so that an adoptive mother, according to the Mitakshara law, succeeds before the adoptive father (r). On the death of a son adopted in *dwyamushyayana* form, the adoptive mother and natural mother both inherit equally as co-heiresses (s).

8. Father.—

Mayukha Law.—In cases governed by the Mayukha, the father succeeds before the mother. See note (l) under the head "Mother."

9. Brother.—

(i) of the whole blood.

(ii) of the half-blood.

(1) *Whole before half-blood.*—Brothers of the whole blood succeed before those of the half-blood (t). The half-brothers referred to here are sons of the same father by a different mother. Sons of the same mother by a different father are not entitled to succeed as "brothers" (u).

(j) *Karuppai* v. *Sankaranarayanan* (1904) 27 Mad. 300, 311-312. See also *Babui Rita* v. *Babu Puran* (1916) 1 Pat. L.J. 581, 38 I.C. 44, ('16) A.P. 8.

(k) *Raj Bachan Singh* v. *Bhanwa*, (1929) 4 Luck. 690, 118 I.C. 760, ('29) A.O. 296.

(l) *Anandi* v. *Hari* (1909) 33 Bom. 404, 3 I.C. 745.

(m) *Khodabhai* v. *Bahdhar* (1882) 6 Bom. 541.

(n) *Vrijbhukandas* v. *Bai Parvati* (1908) 32 Bom. 26; *Jullessur* v. *Uggur* (1883) 9 Cal. 725.

(o) *Kojiyadu* v. *Lakshmi* (1882) 5 Mad. 149; *Vedammal* v. *Vedanayaga* (1908) 31 Mad. 100; *Dal Singh* v. *Dini* (1910) 32 All. 155, 5 I.C. 521; *Baldeo* v. *Mathura* (1911) 33 All. 702, 11 I.C. 43 [unchastity]; *Basappa* v. *Rayava* (1905) 29 Bom. 91 [F.B.] [remarriage].

(p) *Rama Nand* v. *Surgiani* (1894) 16 All. 221; *Ramasami* v. *Narasamma* (1885) 8 Mad. 133; *Tahaldai* v. *Gaya Pershad* (1910) 37 Cal. 214, 5 I.C. 135; *Seethai* v. *Nachiar* (1914) 37 Mad. 286, 22 I.C. 18, ('14) A. M. 30; *Naranitha Krishna* v. *Collector of Tinnevelly* (1935) M. W. N. 1001.

(q) *Kesserbai* v. *Valab* (1880) 4 Bom. 188; *Russoobai* v. *Zoolekhabai* (1895) 19 Bom. 707.

(r) *Anandi* v. *Hari* (1909) 33 Bom. 404, 3 I.C. 745.

(s) *Basappa* v. *Gurlingama* (1933) 57 Bom. 74, 142 I.C. 634, ('33) A.B. 137; *Kantawa* v. *Sangangowda* (1942) Bom. 340, 201 I.C. 633, ('42) A.B. 193.

(t) *Anant Singh* v. *Durga Singh* (1910) 37 I.A. 191, 32 All. 363, 6 I.C. 787.

(u) *Ekoba* v. *Kashiram* (1922) 46 Bom. 716, 60 I.C. 341, ('22) A.B. 27.

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(2) *Mayukha Law.*—In cases governed by the Mayukha, brothers of the half-blood share with the father's father (*v*).

To the separate property of a person all his brothers succeed though some are joint with him as to other property and others are completely divided from him (*w*).

10. **Brother's son—**

(*i*) **of the whole blood.**

(*ii*) **of the half-blood.**

(1) *Takes before brother's son's son.*—The brother's son succeeds before the brother's son's son (*x*).

(2) *Whole blood before half-blood.*—Sons of brothers of the whole blood succeed before sons of brothers of the half-blood [see s. 44].

(3) *Take per capita.*—Brothers' sons take *per capita* [see s. 32].

NOTE.—The Mitakshara, in discussing the place of the father's mother in the order of succession, says: "No place, however, is found for her in *the compact series of heirs* from the father to the nephew. . . . . She must, therefore, of course succeed immediately after the *nephew*": Mit., ch. II, s. 5, v. 2. According to this text, as literally interpreted "*the compact series of heirs*", that is, the series of heirs first entitled to inherit, ends with the brother's son. But it has been held by the Privy Council in *Buddha Singh* v. *Laltu Singh* (*y*), that the expression "brother's son" in the above text includes "brother's son's son," so that the compact series ends not with the brother's son, but with the brother's son's son [No. 11], and the father's mother [No. 12], takes not after the brother's son, but after the brother's son's son.

11. **Brother's son's son.—**

(1) See notes to No. 10 above.

(2) *Whole blood before half-blood.*—Grandsons of the whole brother take before the grandsons of the half-brother [see s. 44].

(3) Brother's sons' sons take *per capita* [see s. 32].

(4) The compact series of heirs under the Mitakshara as interpreted by the Privy Council ends with the brother's son's son. See No. 10 above note (3).

12. **Father's mother.**

13. **Father's father.**

13A. **Son's daughter.—**

(1) This is the place now assigned to the son's daughter by the Hindu Law of Inheritance (Amendment) Act 2 of 1929. Before that Act she was recognized as an heir only in the Bombay [s. 55 (1)] and Madras [s. 56 (1)] Presidencies, where she ranked as a bandhu. Under the Act she inherits

(*v*) Chap. v, s. 8, para. 20.

(*w*) *Sham Rao* v. *Krishnarao* (1941) Nag. 598, ('41) A.N. 297.

(*x*) *Sher Singh* v. *Basdeo Singh* (1928) 50 All. 904, 110 I.C. 712, ('28) A.A. 612.

(*y*) (1915) 42 I.A. 208, 37 All. 604, 30 I.C. 529, ('15) A.PC. 70, approving *Kalian Rai* v. *Ram Chandra* (1902) 24 All. 128 and disapproving *Suraya* v. *Lakshminarasamma* (1882) 5 Mad. 291.

as an heir in *all* places where the Mitakshara law applies, and succeeds immediately after the father's father. See note to No. 13D below, "Hindu Law of Inheritance (Amendment) Act 2 of 1929." S. 43

(2) *Estate.*—The son's daughter takes an absolute estate in Bombay [s. 170 (2)]. In Madras, she takes a limited estate [s. 168]. She would also take a limited estate elsewhere.

13B. Daughter's daughter.—

(1) This is the place now assigned to the daughter's daughter by the Hindu Law of Inheritance (Amendment) Act 2 of 1929. Before this Act, she was recognized as an heir only in the Bombay [s. 55 (1)] and Madras [s.56 (1)] Presidencies, where she ranked as a bandhu. Under the Act she inherits as an heir in all places where the Mitakshara law applies, even in provinces where before the Act she was not an heir (z), and succeeds next after the son's daughter. See note to N. 13D below, "Hindu Law of Inheritance (Amendment) Act 2 of 1929."

(2) *Estate.*—The daughter's daughter takes an absolute estate in Bombay [s. 170 (2)]. In Madras, she takes a limited estate [s. 168]. She would also take a limited estate elsewhere.

13C. Sister.—

(1) This is the place now assigned to the sister by the Hindu Law of Inheritance (Amendment) Act 2 of 1929. Before that Act, she was recognized as an heir only in the Bombay [s. 64] and Madras Presidencies [s. 56]. But the Act is applicable even where the sister had not been previously recognized as an heir (a).

As regards the Bombay Presidency, she is expressly mentioned as an heir in the Mayukha. She is not, however, expressly mentioned as such in the Mitakshara, but her right as an heir has long since been recognized [s. 64 (1)]. Her place also in the order of succession has long since been established: she succeeds immediately after the father's mother, and *before the father's father* [s. 65 (1), s. 72 (12), s. 77 (12)]. Her place in the order of succession is not affected by the Act, for the Act contemplates succession *after* the father's father, while her place as determined by a series of decisions since 1865 is immediately after the father's mother whether under the Mitakshara or the Mayukha (b).

In the Madras Presidency, the sister ranked as a bandhu before the Act [s. 56 (1)]. Under the Act she succeeds next after the daughter's daughter.

(2) *Half-sister.*—The question whether a half-sister gets the benefit of the Act has given rise to difference of opinion. The Privy Council have held (thus settling the difference between the various High Courts) that the term 'sister' includes a half-sister; but a full sister and a half-sister do not take together. The latter takes only in default of the full sister (c).

(3) *Estate.*—The sister takes an absolute estate in Bombay [s. 170 (2)]. In Madras, she takes a limited estate [s. 168]. She would also take a limited estate elsewhere.

(z) *Dalsingar Singh* v. *Jainath Kuar* (1940) 15 Luck. 229, 136 I.C. 753, ('40) A.O. 138.

(a) *Bindeshari Singh* v. *Baij Nath Singh* (1938) 13 Luck. 380, 168 I. C. 733, ('37) A. O. 402; *Mt. Rajpali Kunwar* v. *Surju Rai* (1936) 58 All. 1041 (F.B.), 163 I. C. 756, ('36) A. A. 507.

(b) *Shidramappa* v. *Nilambai* (1933) 57 Bom. 377, 144 I.C. 925, ('33) A.B. 137.

(c) *Mt. Sahodra* v. *Ram Babu* (1943) 69 I.A. 145, 45 Bom. L.R. 350, 206 I.C. 396, ('43) A. PC. 10.

S. 43

(4) It is now held by all the courts that the Act applies though the last male-owner died before the Act, if the succession in respect of which the question arose, opened after the Act (*d*). But the Act obviously does not apply where the succession opened before the Act (*e*).

13D. Sister's son.—

(1) This is the place now assigned to the sister's son by the Hindu Law of Inheritance (Amendment) Act 2 of 1929. Before that Act, he ranked as a bandhu [s. 64, No. 3]. Under the Act, he succeeds next after the sister.

(2) *Hindu Law of Inheritance (Amendment) Act* 2 *of* 1929.—This Act applies only to cases "subject to the Law of Mitakshara." The material section is section 2 which is as follows:—

"A son's daughter, daughter's daughter, sister, and sister's son shall, in the order so specified, be entitled to rank in the order of succession next after a father's father [No. 13] and before a father's brother [No. 14]: Provided that a sister's son shall not include a son adopted after the sister's death."

The Act came into force on 21st February, 1929. It is not retrospective. It applies only to cases where the succession opens after that date.

The Act applies to Jains in Gujarat governed by Mayukha, the sister's son is therefore preferred to father's sister (*f*).

In ascertaining the heirs of a maiden's father—they being her heirs in respect of her stridhana when she dies leaving neither brother, mother nor father—Act II of 1929 is applicable (*g*).

The Act is set out in Appendix VIII below.

13E. Half-sister's son.—

This is the place which should be given to the half-sister's son according to the Act. (See note under Half-sister, *supra*.)

14. Paternal uncle.

15. Paternal uncle's son [see s. 32].

16. Paternal uncle's son's son.

He succeeds before 20 (*h*).

Whole blood and half-blood.—See s. 44 and notes thereto.

17. Father's father's mother.

18. Father's father's father.

19. Father's paternal uncle.

20. Father's paternal uncle's son.

21. Father's paternal uncle's son's son.

22. Brother's son's son's son (*i*).

23. Uncle's son's son's son.

(*d*) *Sm. Shakuntala Devi* v. *Kaushalya Devi* (1936) 17 Lah. 356, 162 I. C. 718, ('36) A. L. 124; *Mt. Sattan* v. *Janki* ('36) A. L. 139, 163 I. C. 480; *Bindeshari Singh* v. *Baij Nath Singh* (1938) 13 Luck. 380, 168 I. C. 733, ('37) A. O. 402; *Pokhan Dusadh* v. *Must. Mansa* (1937) 16 Pat. 215 (F. B.), 167 I. C. 17, ('37) A. P. 117; *Mt. Rajpali Kunwar* v. *Surju Rai* (1936) 58 All. 1041 (F. B.), 163 I. C. 756, ('36) A. A. 507; *Lakshmi* v. *Anantarama* (1937) Mad. 948 (F.B.), 171 I. C. 7, ('37) A.M. 699.

(*e*) *Kannhai Lal* v. *Mt. Champa Devi* (1935) 153 I. C. 545, ('35) A. A. 203.

(*f*) *Ambubai* v. *Keshav Bandochand* (1941) Bom. 250, 195 I.C. 172, ('42) A.B. 233, 43 Bom. L. R. 114.

(*g*) *Shamrao* v. *Raghunandan* (1939) Bom. 228, ('37) A. B. 194.

(*h*) *Buddha Singh* v. *Lallu Singh* (1915) 42 I.A. 208, 37 All. 604, 30 I.C. 529, ('15) A.PC. 70.

(*i*) *Venilal* v. *Parjaram* (1896) 20 Bom. 173.

Following the reasoning of the Privy Council in *Buddha Singh* v. *Laltu Singh* (*j*), the Madras High Court held that the father's paternal uncle's son's son (x3 in the third line of the Table at p. 34) should be preferred to the great-great-grandson of the grandfather (x4 in the second line of that Table). (*k*). The decision implies that he would be also preferred to the great great grandson of the father (x4 in the first line of the Table at p. 34), who will also be postponed to the paternal uncle's son's son (x3, in the second line of that Table) (*l*). Ss. 43, 44

So far as ancestors and descendants are concerned, the further continuation of the table is of no practical importance. As to collaterals beyond this stage, it is difficult to see that one claimant can be superior to another in the capacity to confer spiritual benefit. The rules of preference will then probably be:

(1) He who claims through a nearer ancestor will be preferred to one claiming through a remoter ancestor.

(2) In the line of any ancestor, the nearer excludes the more remote.

44. Whole blood and half-blood.—(*1*) A sapinda of the whole blood is preferred to a sapinda of the half-blood. This preference, however, is confined to sapindas of the *same* degree of descent from the common ancestor; it does not apply to sapindas of *different* degrees (*m*). In the United Provinces (*n*), Bengal (*o*) and Madras (*p*), this rule applies not only to brothers and brothers' sons, but to remoter sapindas. It has now been held by the Privy Council that the rule applies to all the Mitakshara Schools (*q*) and the Bombay cases (*r*) holding a different view are overruled. The Punjab case (*s*) holding a view similar to Bombay must also be regarded as overruled.

Thus a paternal uncle of the whole blood is entitled to succeed in preference to a paternal uncle of the half-blood, they being sapindas of the same degree of descent. But a paternal uncle of the half-blood is entitled to inherit in preference to the son of a paternal uncle of the whole blood, the former being a nearer sapinda of the deceased than the latter.

According to the Customary Law of Kumaon, applicable to the Khasas, if a man dies sonless, his brothers do not inherit as brothers but as sons of the father to whom the estate reverted on the sonless man's death. When nephews or cousins succeed, they take their father's share, *i.e.*, *per stirpes* and not *per capita* (*t*). But this principle does not apply to the Manrals (*u*).

(*j*) (1915) 42 I.A. 208, 37 All. 604, 30 I.C. 529, ('15) A.PC. 70.

(*k*) *Soobramiah* v. *Natarajan* (1930) 53 Mad. 61, 127 I.C. 113, ('30) A. M. 534.

(*l*) *Venkateshwara Rao* v. *Audinarayana* (1935) 58 Mad. 323, 154 I.C. 923, ('35) A.M. 129.

(*m*) *Suba Singh* v. *Sarafraz* (1897) 19 All. 215 [F. B.]; *Ganga Sahai* v. *Kesri* (1915) 42 I.A. 177, 37 All. 545, 30 I.C. 265, ('15) A.PC. 81.

(*n*) (1897) 19 All. 215 [F. B.], *supra*.

(*o*) *Sham Singh* v. *Kishun Sahai* (1907) 6 Cal. L. J. 190.

(*p*) *Nachiappa* v. *Rangasami* (1915) 28 Mad. L.J. 1, 26 I.C. 757, ('15) A.M. 1088 [F.B.].

(*q*) *Garuddas* v. *Laldas* (1933) 60 I. A. 189, 142 I. C. 807, ('33) A. PC. 141.

(*r*) *Samat* v. *Amra* (1882) 6 Bom. 394, 397; *Vithalrao* v. *Ramrao* (1900) 24 Bom. 317; *Saguna* v. *Sadashiv* (1902) 26 Bom. 710, 715; *Shankar Baji* v. *Kashinath* (1927) 51 Bom. 194, 100 I.C. 430, ('27) A.B. 97.

(*s*) *Hiranand* v. *Maya Das* (1894) Punj. Rec., no. 83.

(*t*) *Tularam* v. *Shyamlal* (1924) 49 All. 818; *Ganga Sah* v. *Hemlal Sah* (1939) All. 122.

(*u*) *Lachhan Singh* v. *Jhagar Singh* (1939) All. 406, ('39) A.A. 437.

Samanodakas.

Ss. 45, 46

45. Order of succession among Samanodakas.—Failing all sapindas, the inheritance passes to samanodakas, the nearer line excluding the more remote, and a nearer kinsman in one line excluding a remoter kinsman in the same line (*v*) [ss. 40, 44].

Bandhus.

46. Bandhus.- (*1*) On failure of sapindas and samanodakas, but not until then, the inheritance passes to bandhus (*w*).

(*2*) The gotraja sapindas and samanodakas of a Hindu are all agnates, that is, persons connected with him by an unbroken line of male descent. The bandhus or bhinna-gotra sapindas are all cognates, that is, persons connected with him through a female or females. The bandhus of a person are his blood-relations connected *through females* who have passed into other families or gotras (*x*).

(*3*) Every bandhu must be related to the deceased through at least one female. He may, however, be related to him through two females (*y*) or even more than two.

(*4*) The Mitakshara [ch. 2, sec. 6, para. 1] mentions three classes of bandhus, namely (1) *Atma bandhus*, that is, one's own bandhus, (2) *Pitri bandhus*, that is, the father's bandhus, and (3) *Matri bandhus*, that is, the mother's bandhus, and enumerates the following nine relations as bandhus :—

I. *Atma bandhus* :—

1. father's sister's son ;
2. mother's sister's son ;
3. mother's brother's son.

The word " son " is used in a generic sense and includes son's son (*z*).

(*v*) Sarvadhikari's Hindu Law of Inheritance, 2nd ed., p. 687.

(*w*) *Ram Baran* v. *Kamla Prasad* (1910) 32 All. 594, 6 I. C. 698.

(*x*) *Vedachela* v. *Subramania* (1921) 48 I. A. 349, 354, 44 Mad. 753, 64 I. C. 402, ('22) A. PC. 33.

(*y*) *Krishna* v. *Venkatarama* (1906) 29 Mad. 115; *Venkatagiri* v. *Chandru* (1900) 23 Mad. 123; *Parot Bapalal* v. *Mehta Harilal* (1895) 19 Bom. 631.

(*z*) *Adit Narayan* v. *Mahabir Prasad* (1921) 48 I. A. 86, 6 Pat. L. J. 140, 60 I. C. 251, ('21) A. PC. 53 where it was held that a mother's sister's son's son is an *atma bandhu*.

II. *Pitri bandhus* :— S. 46

4. father's father's sister's son;
5. father's mother's sister's son;
6. father's mother's brother's son.

III. *Matri bandhus* :—

7. mother's father's sister's son;
8. mother's mother's sister's son;
9. mother's mother's brother's son.

It was at one time thought that only the nine relations expressly mentioned in the Mitakshara were bandhus. But it is now well established that the enumeration of bandhus in the Mitakshara is, illustrative and not exhaustive. For it would be unreasonable to hold that the mother's brother's son is a bandhu, and his father, that is, the mother's brother, is not a bandhu (*a*). And likewise, it would be unreasonable to hold that the mother's brother is a bandhu and his father, that is, the maternal grandfather is not a bandhu. Thus the mother's brother, the maternal grandfather, and several other relations have been held to be bandhus.

Besides the nine relations enumerated in the Mitakshara, the following relations have been held to be bandhus, namely :—

[*Sister's son* (*b*).] Under the Hindu Law of Inheritance (Amendment) Act 2 of 1929, the sister's son inherits with gotraja sapindas, and succeeds next after the sister. See s. 43, No. 13 D.

Half-sister's son (*c*) but not a sister's step-son (*d*).

Brother's daughter's son (*e*).

Daughter's son's son (*f*).

Sister's son's son (*g*).

Daughter's daughter's son (*h*).

Sister's daughter's son (*i*).

Father's sister's son's son (*j*).

Father's sister's daughter's son (*k*).

(*a*) *Gridhari Lall* v. *Bengal Government* (1868) 12 M. I. A. 448; *Muthuswami* v. *Simambedu* (1896) 19 Mad. 405, 23 I. A. 83.

(*b*) *Amrita Kumari* v. *Lakhinarayan* (1868) 2 Beng. L.R. [F.B.] 28; *Chelikani* v. *Vencata* (1871) 6 Mad. H.C. 278; *Raghunath* v. *Murman Misr* (1898) 20 All. 191.

(*c*) *Subbaraya* v. *Kylasa* (1892) 15 Mad. 300.

(*d*) *Saminatha* v. *Angammal* (1922) 45 Mad. 257, 65 I. C. 736, ('22) A.M. 46.

(*e*) *Mussamutt Doorga Bibee* v. *Janki* (1873) 10 Beng. L. R. 341.

(*f*) *Krishnayya* v. *Pichamma* (1888) 11 Mad. 287; *Sheobarat* v. *Bhagwati* (1895) 17 All. 523; *Tirumalachariar* v. *Andal* (1907) 30 Mad. 406.

(*g*) *Balusami* v. *Narayana* (1897) 20 Mad. 342.

(*h*) (1907) 30 Mad. 406, *supra*; *Ajudhia* v. *Ram Sumar* (1909) 31 All. 454, 2 I. C. 376; *Ramehal* v. *Pan Mati* (1910) 32 All. 640, 7 I. C. 292; *Kalimuthu* v. *Ammamuthu* (1934) 58 Mad. 238, 153 I.C. 107, ('34) A. M. 611.

(*i*) *Umaid Bahadur* v. *Udoi Chand* (1881) 6 Cal. 119 [F. B.]; *Sham Dei* v. *Birbhadra Prasad* (1921) 43 All. 463, 62 I.C. 432, ('21) A.A. 178.

(*j*) *Hrihar* v. *Ram Daur* (1925) 47 All. 172, 82 I. C. 1032, ('25) A. A. 17.

(*k*) *Parot Bapalal* v. *Mehta Harilal* (1895) 19 Bom. 631; *Venkatagiri* v. *Chandru* (1900) 23 Mad. 123; *Krishna* v. *Venkatarama* (1906) 29 Mad. 115.

Mother's father (*l*).

Maternal uncle (*m*).

Grandfather's son's daughter's son (*n*).

Great grandfather's son's daughter's son (*o*).

Great great grandfather's son's son's daughter's son (*p*).

Father's father's father's daughter's son (*q*).

Father's father's sister's son's son (*r*).

Father's mother's brother (*s*).

Father's maternal grandfather's daughter's son (*t*).

Mother's mother's brother's son's son (*u*).

Mother's mother's brother's daughter's son (*v*).

Mother's sister's son's son (*w*).

Mother's father's adopted son (*x*).

Mother's father's grand nephew (*y*).

Father's sister's son's daughter's son (*z*).

Mother's paternal grandfather's daughter's son's son (*a*).

Mother's paternal grandfather's son's son's son (*a*).

47. Rules for determining heritable bandhus.—Are all the blood relations of a person connected through a female, heritable bandhus or bhinna-gotra sapindas?

(i) The question naturally arises whether the term 'sapinda', in this connection, is used in the general sense (s. 36) or the narrower sense (s. 37). In other words, whether all the relations connected by community of particles of the same body (whatever the degree of relationship to and from a common ancestor may be) are entitled to inherit as bandhus or only those who are connected within certain specified degrees.

This question arose for decision in *Ramchandra* v. *Vinayak* (*b*). In that case the relationship between the

(*l*) *Chinnammal* v. *Venkatachala* (1892) 15 Mad. 421.

(*m*) *Muthusami* v. *Simambedu* (1896) 19 Mad. 405, 23 I.A. 83; *Vedachela* v. *Subramania* (1921) 48 I. A. 349, 44 Mad. 753, 64 I. C. 462, ('22) A. PC. 33.

(*n*) *Tirath Ram* v. *Mst. Kahan Devi* (1920) 1 Lah. 585, 595-6, 60 I. C. 101, ('21) A. L. 149.

(*o*) *Ram Sia* v. *Bua* (1925) 47 All. 10, 84 I.C. 360 ('24) A.A. 790; *Parmanandas* v. *Parbhudas* (1912) 14 Bom. L. R. 630, 16 I.C. 591.

(*p*) *Manik Chand* v. *Jagat Settani* (1890) 17 Cal. 518.

(*q*) *Krishna* v. *Venkatarama* (1906) 29 Mad. 115.

(*r*) *Sethurama* v. *Ponnammal* (1889) 12 Mad. 155; *Chamanlal* v. *Ganesh* (1904) 28 Bom. 453.

(*s*) *Gridhari Lall* v. *Bengal Government* (1869) 12 M. I. A. 448.

(*t*) *Ananda Bibee* v. *Nowonit Lal* (1883) 9 Cal. 315, 327.

(*u*) *Ratnasubbu* v. *Ponnappa* (1882) 5 Mad. 69.

(*v*) *Babu Lal* v. *Nanku Ram* (1895) 22 Cal. 339.

(*w*) *Adit Narayan* v. *Mahabir Prasad* (1921) 48 I. A. 86, 6 Pat. L. J. 140, 60 I. C. 251, ('21) A. PC. 53; *Bai Vijli* v. *Bai Prabhalakshmi* (1907) 9 Bom. L. R. 1129.

(*x*) *Pudma Coomari* v. *Court of Wards* (1881) 8 I. A. 229, 8 Cal. 302.

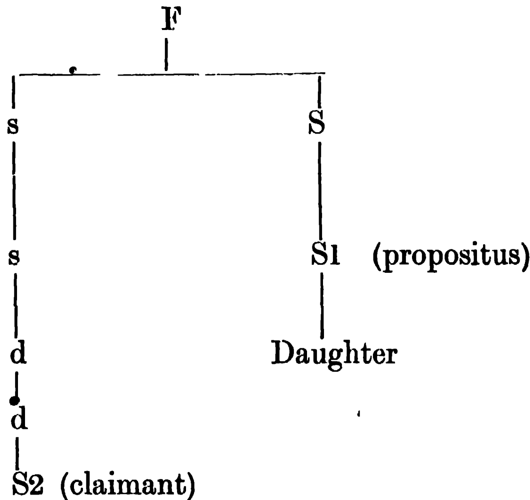
(*y*) 8. I. A. 229, 8 Cal. 302, *supra*.

(*z*) *Kesur Singh* v. *Secretary of State* (192[illegible]) 49 Mad. 652, 95 I.C. 651, ('26) A. M. 881.

(*a*) *Chengiah* v. *Subbaraya* (1930) 58 Mad. L. J. 562, 128 I. C. 172, ('30) A.M. 555.

(*b*) *Ramchandra* v. *Vinayak* (1914) 41 I. A. 290, 312, 42 Cal. 384, 420, 25 I. C. 290, ('14) A. PC. 1.

deceased and the claimant was as appears from the following diagram :— S. 47



After the death of the last male owner (S1), his daughter enjoyed the property. On her death without issue the claimant (S2) claimed the property. He traced his relationship to the common ancestor through his mother. If the narrower sense of the term 'sapinda' is adopted, he is beyond five degrees (*Vide* explanation I below) and he is not entitled to inherit. It was accordingly argued on his behalf that any person related through a female is a heritable bandhu, and there is no restriction as to degrees. It was also contended that the narrower sense of 'sapinda' in Mitakshara chap. III is confined to prohibition in respect of marriage and has nothing to do with inheritance. The Judicial Committee did not accept the contention. It was held that "Vijnaneswara was using the term bandhu in a restricted and technical sense" and that the claimant was not a heritable bandhu.

When the claimant claims through a male, according to the restricted sense of the term "sapinda" he must be within seven degrees. The Allahabad and Bombay High Courts have held that, even when the claimant traces relationship through his father, heritable bandhuship ceases with the fifth degree (*c*). It is submitted that, in such a case, the rule of seven degrees would apply.

(c) *Brijmohan* v. *Kishenlal* (1938) A. L. J. 670, ('38) A. A. 443; *Hanmant Ramji* v. *Vasudeo Hanmant* (1943) Bom. 465, 206 I.C. 152, ('43) A.B. 89.

S. 47 The *general* conclusion arrived at in *Ramchandra* v. *Vinayak* that "the sapinda relationship, on which the heritable right of collaterals is founded, ceases in the case of the bhinna-gotra sapinda with the fifth degree from the common ancestor" (*d*), is applicable only to cases where the claimant claims through his mother as in that case. This is the view of Venkatasubba Rao, J., in *Kesar Singh* v. *Secretary of State for India* (*e*). He said " I have said in the course of this judgment that in the case of bandhus, sapinda relationship ceases beyond the fifth from the mother and the seventh from the father. This is repeatedly referred to in the judgment of the Judicial Committee in *Ramchandra* v. *Vinayak*. The question in that case was whether the plaintiffs who claimed through their mother but who were bhinna-gotra sapindas beyond the fifth degree could inherit. It was held that he could not. I referred to this point because there are some observations in the judgment which may at first sight seem to imply that the limit of sapinda relationship in the case of bandhus ceases with the fifth degree irrespective of whether the claim is traced through the father or the mother. . . . There is nothing in the judgment to suggest that their Lordships intended to do away in the case of bhinna-gotra sapindas the well recognised distinction dependent upon whether the claim is traced through the father or the mother. The view which their Lordships refused to accept is that of Golapchandra Sarkar Shastri—the view which was pressed before the Judicial Committee by Mr. De Gruyther to the effect that the word ' bandhu ' includes either all cognate relations without any restriction or at any rate all cognates within seven degrees on both the father's as well as the mother's side. The distinction to which I have referred is recognised in all works of Hindu law whether the writer belongs to the school of Sarvadhikari or not."

Explanation I.—The five degrees, according to the Hindu mode of computation, are to be calculated from and inclusive of the deceased in the case of ascendants and descendants of the deceased, and from and inclusive of the common ancestor in the case of descendants of the common ancestor.

The father's father's son's son's daughter's daughter's son is not a heritable bandhu for he is in the *sixth* degree from the common ancestor, that is, the father's father (*f*).

(*d*) (1914) 41 I. A. 290, 312, 42 Cal. 384, 420, 25 I.C. 290, ('14) A. PC. 1.

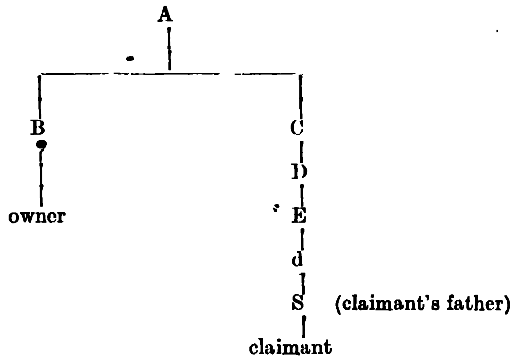
(*e*) (1926) 49 Mad. 652, 689, 95 I. C. 651, ('26) A. M. 881.

(*f*) (1914) 41 I. A. 290, 42 Cal. 384, 25 I. C. 290, ('14) A. PC. 1, *supra*.

For the same reason the father's father's son's son's son's daughter's son is not a heritable bandhu (*g*); so also the great-great-grandfather's great-grandson's daughter's son is not a heritable bandhu (*h*). In these cases, as the claimants trace their descent through their mothers, the sapinda relationship ceases with five degrees. S. 47

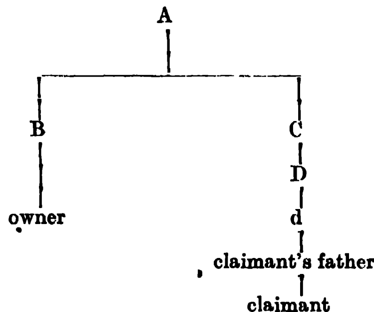
Cases of claimants claiming through the fathers, being more than five degrees but not more than seven degrees have not come up for decision before the Courts. The following special cases may be noted. It is assumed that there is no difficulty as to the number of degrees on the owner's side :—

(1) Diagram 1.



In this case the claimant (tracing his relationship through his father) is not more than seven degrees from the common ancestor; and may, at first sight, be regarded as a heritable bandhu. But *S* (his father) who claims through his mother is more than five degrees from *A*, and is not a heritable bandhu. To hold that the claimant is a bandhu and *S*, his father is not a heritable bandhu, is an anomaly. The sapindaship of the claimant in such a case is described as a sapindaship by frog's leap (Dr. Sarvadhikari's Principles of Hindu Law, 2nd ed., p. 592). He is not a heritable bandhu.

(2) Diagram 2.

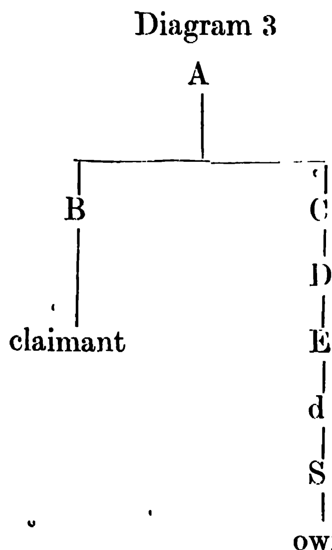


In this case, the claimant (claiming through his father) is within seven degrees. His father (claiming through his mother) is not beyond five degrees. Both are heritable bandhus.

(*g*) *Shib Sahai* v. *Saraswati* (1915) 37 All. 583, 30 I. C. 903, ('15) A.A. 409. The decision is correct, but the mode of computation adopted in the case is, it is submitted, incorrect. This has now been recognized in *Ram Sia* v. *Bua* (1925) 47 All. 10, 84 I.C. 360, ('24) A.A. 790.

(*h*) *Ram Parshad* v. *Idu Mal* (1932) 13 Lah. 247, 134 I.C. 122, ('32) A. L. 394.

S. 47 (ii) "In order to entitle a man to succeed to the inheritance of another he must be so related to the latter that they are sapindas of each other" (i); in other words, the right of inheritance accrues to a bandhu, if the late owner and the person claiming the inheritance were related as sapindas to each other. By reason of the principle of mutuality, the diagrams in the preceding rule will hold good, if the owner and claimant are interchanged. Thus, the first diagram becomes the accompanying diagram, by the principle of mutuality.



Just as the claimant in Diagram 1 is a sapinda by frog's leap and is not a heritable bandhu, the owner in the Diagram 3 is a sapinda by frog's leap and is not a heritable bandhu of the claimant. Therefore, by the rule mentioned in this paragraph, the claimant is not a heritable bandhu of the owner.

But if the interchange is made in Diagram 2, the result is that the owner is a heritable bandhu of the claimant. Therefore, the claimant is also a heritable bandhu of the owner.

(iii) Is there any other principle limiting heritable bandhus? There are two views on this matter.

(a) Dr. Sarvadhikari noticing the fact that the nine bandhus enumerated in the Mitakshara are descendants from common ancestors who are members of the following four families, namely

(1) The family of the propositus and his agnate ancestors, *e.g.*, one's father's sister's son, one's father's father's sister's son.

(i) *Ramchandra* v. *Vinayak* (1914) 41 I.A. 290, 312, 42 Cal. 384, 25 I.C. 290. ('14) A. PC. 1; *Umaid Bahadur* v. *Udoi Chand* (1881) 6 Cal. 119 [F.B.]; *Babu Lal* v *Nanku Ram* (1895) 22 Cal. 339.

(2) The family of the mother's agnate ancestors, *e.g.*, one's mother's sister's son, one's mother's brother's son, one's mother's father's sister's son. S. 47

(3) The family of the father's mother's agnate ancestors, *e.g.*, one's father's mother's sister's son and one's father's mother's brother's son.

(4) The family of the mother's mother's agnate ancestors, *e.g.*, one's mother's mother's sister son and one's mother's mother's brother's son.

and applying the principle of mutuality, infers that the propositus must be a descendant of a common ancestor who is a member of the following families, *viz.*, (i) claimant's agnate family, (ii) claimant's mother's agnate family, (iii) claimant's father's mother's agnate family, (iv) claimant's mother's mother's agnate family, that is to say, the claimant must be either

(a) a member of the families 2, 3, 4

or (b) a daughter's son
or (c) a daughter's son's son
or (d) a daughter's daughter's son
} of an agnate member of the four families 1, 2, 3 and 4.

Accordingly the following four kinds of descendants are excluded :—

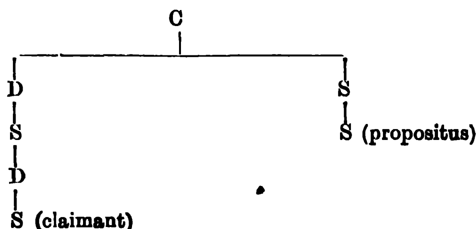
(1) Daughter's daughter's son's son—*Umaid Bahadur* v. *Udai Chand* (1880) 6 Cal. 119. This is only an *obiter dictum*. The actual decision related to daughter's daughter's son.

(2) Daughter's son's son's son—*Chinna Pichu* v. *Padmanabha* (1921) 44 Mad. 121, 59 I.C. 690, ('21) A.M. 671. Only one judgment is based on Dr. Sarvadhikari's reasoning. The reasons given by the other judge are different. The decision cannot be regarded as of much weight: *Lowji* v. *Mithabai* (1900) 2 Bom. L.R. 842. The decision assumes that the bandhus should be found only in the abovementioned four families.

S. 47 (3) Daughter's son's daughter's son—*Gajadhar Prasad* v. *Gavri Shankar* (j).

(4) Daughter's daughter's daughter's son—That is, there cannot be three females between a common ancestor and the claimant or the propositus.

(b) According to the second view, the Mitakshara merely enumerates the first cousins of the propositus, of his father and of his mother. It was not intended to limit heritable bandhuship to particular individuals or to descendants of particular families, or to certain kinds of descendants in these families. No ancient text supports such limitation. The definition of a bandhu as a bhinna-gotra sapinda even adopting the narrower meaning of the term 'sapinda' does not involve such limitation. The Judicial Committee has held (s. 46) that the enumeration of the bandhus in the Mitakshara is not exhaustive. Then why should one infer by implication that the families in which bandhus are to be found—families not mentioned as such by Vijnaneswara—are exhausted by the enumeration of the bandhus? Similarly, why should the enumeration be considered exhaustive as to the types of descendants in these families? Accordingly it was held in *Kesar Singh* v. *Secretary of State* (k) by the High Court of Madras that the father's father's daughter's son's daughter's son was a heritable bandhu. The following diagram explains the relationship of the claimant with the propositus in that case:



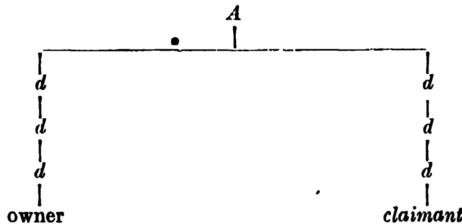
In the above diagram C represents the common ancestor. S represents the son and D the daughter. Here the claimant claims relationship through his *mother* and is *fifth* in descent from the common ancestor C. The propositus traces relationship through his *father* and is *third* in descent from the common ancestor, C, that is, within *seven* degrees from him. The test of degree is thus satisfied. Upon the same facts the test of mutuality is also satisfied. No other test or limitation is essential.

(j) (1932) 54 All. 698, 138 I.C. 501, ('32) A.A. 417.

(k) (1926) 49 Mad. 652, 95 I.C. 651, ('26) A.M. 881.

In the course of the judgment, it was pointed out that at the time of the decision in *Umaid Bahadur* v. *Udai Chand* (1880) 6 Cal. 119, Dr. Sarvadhikari was delivering his lectures and the *obiter dictum* of the learned judges in that case was probably based on his view.

According to this view, there may be three females intervening between the common ancestor and the claimant propositus, that is, in the line of ascent or line of descent. For example, in the accompanying diagram, the owner and claimant are each within five degrees and each is sapinda of the other. Here the claimant is a heritable bandhu though there are six females intervening between him and the owner.



• This point has not yet arisen before the Judicial Committee. It is submitted that the Madras view is correct.

(1) Dr. Sarvadhikari implies more than can be legitimately read in the text of the Mitakshara (*l*).

(2) The reasoning of the Allahabad High Court differing from the Madras view proceeds, to some extent, on the difficulty of fitting with the Madras view the groups atma bandhus, pitri bandhus, matri bandhus. That all bandhus should be divided into these three classes only is itself doubtful. (See *infra* s. 54A.)

A Full Bench of the Madras High Court has affirmed its former view overruling 44 Mad. 121 and dissenting from 6 Cal. 119 & 54 All. 698 (*m*).

48. Who are heritable bandhus.—We are now in a position to enumerate the *heritable* bandhus whichever view—that of Madras or Allahabad—ultimately prevails. In each particular case, it is enough to see (1) whether he is a sapinda in the narrower sense, and (2) whether there is mutuality between the owner and the claimant. If the Madras view prevails, all other conditions are immaterial. If the Allahabad view is accepted, (3) he must belong to one of the four types of descendants and he must be descended from an agnate member of any of the four families (*n*) and must be within five degrees of the common ancestor. The last clause also represents the Bombay view (*o*).

(*l*) *Uma Shankar* v. *Nageshwari* (1918) 3 Pat. L. J. 663, 48 I.C. 625, ('18) A. P. I. 437.

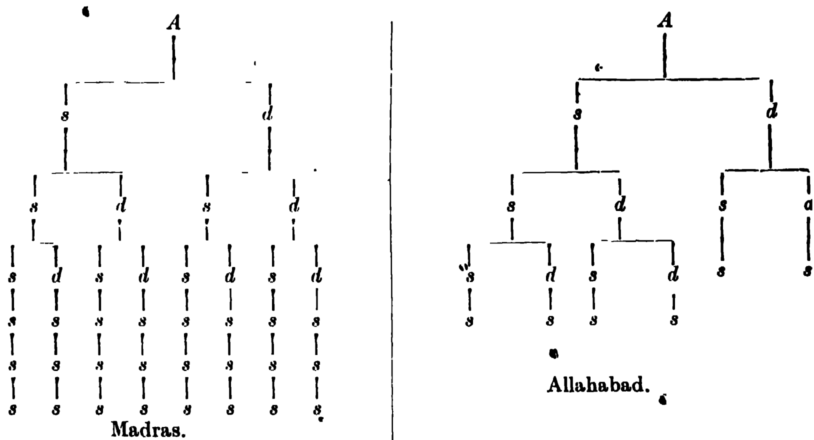
(*m*) *Seelam Nagamma* v. *Reddam Lingareddi* (1943) Mad. 754, 209 I.C. 80, ('43) A.M.

(*n*) *Gajadhar Prasad* v. *Gauri Shanker* (1932) 54 All. 698, 138 I.C. 561, ('32) A.A. 417.

(*o*) See cases cited in footnote (*c*) at p. 51, *supra*.

Ss. 48, 49

In the following diagram the males (s) are all bandhus of the propositus, *A* being a cognate ancestor of his.



In the above diagrams sapindas by frog's leap are excluded. *A*'s daughter's son's daughter's son shown in the Madras diagram was recognized in *Kesari Singh*'s case (*p*) but not in *Gajadhar* v. *Gavri Shankar* (*q*). *A*'s son's son's daughter's son's son shown in the Madras diagram is not now held to be an heir in *Brijmohan* v. *Kishenlal* (*r*).

If *A* is an agnate ancestor of the owner, all the s's on the extreme left are Gotraja Sapindas. The others are bandhus.

49. Three classes of bandhus.—Three classes of bandhus have already been mentioned [s. 46 (*4*)].

Atma bandhus may be subdivided into—

(1) *owner's* cognate descendants,

(2) *father's* cognate descendants—of these the *sister's son* has gone higher up by legislation.

(3) cognate descendants of *father's father*, and *mother's father* and his descendants.

} an ancestor and collaterals.

Pitri bandhus may be subdivided into—

(1) *father's father's father's* cognate descendants,

(2) *father's mother's father* and his descendants.

Matri bandhus may be subdivided into—

(1) *mother's father's father* and his descendants,

(2) *mother's mother's father* and his descendants.

All the above bandhus should satisfy the limit of degrees.

(*p*) (1926) 49 Mad. 652, 95 I.C. 651, ('26) A. M. 881.

(*q*) (1932) 54 All. 698, 138 I.C. 561, ('32) A.A. 417.

(*r*) (1938) A. L. J. 670, ('38) A. A. 443.

50. Rules for determining order of succession among male bandhus.—First rule laid down by the Judicial Committee.— In *Muthusami* v. *Muthukumarasami* (*s*), the claimants were (1) mother's half brother and (2) father's father's sister's son. The Madras High Court in the course of the judgment (*t*) laid down four propositions. The first proposition defines bandhu. The second proposition lays down that the three classes *atma bandhus*, *pitri bandhus*, and *matri bandhus* succeed in the order in which they are named. Accordingly the mother's half brother who was an *atma bandhu* was preferred to the rival claimants who were *pitri bandhus*. This judgment was affirmed by the Privy Council. Thus, the first rule we get relating to the order of succession among the bandhus is (1) *Atma bandhus* (one's own bandhus) succeed before *pitri bandhus* (father's bandhus), and *pitri bandhus* succeed before *matri bandhus* (mother's bandhus). **Ss. 50, 50A**

Illustrations.

(a) The mother's father's daughter's son's son (mother's sister's grandson), [s. 54, no. 25 at p. 67], being an *atma bandhu*, is entitled to succeed in priority to the mother's father's father's daughter's son (mother's paternal aunt's son) [p. 68, no. 6] who is a *matri bandhu* : *Adit Narayan* v. *Mahabir Prasad* (1921) 48 I.A. 86, 6 Pat. L.J. 140, 60 I.C. 251, ('21) A. PC. 53.

(b) Father's sister's daughter's son being an atma bandhu is entitled to succeed in priority to paternal grandfather's sister's son, who is a pitri bandhu (*u*).

It is important to note, as observed by the Privy Council, that rule (1) is *not* dependent on individual propinquity or on the efficacy of offerings to the deceased (*v*).

50A. Descendants preferred to those who are not descendants.—We have seen (sec. 49) that *atma bandhus* may be divided into (1) descendants of the propositus, (2) those who are not descendants.

No case of rival claimants, one being a descendant and the other not, has come up before the Judicial Committee. The Bombay and Madras High Courts have held that the descendants of the propositus are entitled to preference over those who are not descendants. In *Dattatraya* v. *Gangabai* (*w*), the rival claimants were a son's daughter's son and the father's daughter's daughter. The claim of the latter would be disallowed in Madras on the ground that all female bandhus rank

(*s*) (1896) 19 Mad. 405, 23 I. A. 83.
(*t*) *Muttusami* v. *Muttukumarasami* (1893) 16 Mad. 23.
(*u*) *Krishna Ayyangar* v. *Venkatarama Ayyangar* (1906) 29 Mad. 115.
(*v*) *Adit Narayan* v. *Mahabir Prasad* (1921) 48 I.A. 86, 95, 60 I.C. 251, ('21) A.PC. 53.
(*w*) (1922) 46 Bom. 541, 77 I.C. 17, ('22) A. B. 321.

Ss. 50A, 51

after male bandhus and in any other province on the ground that no female bandhus are recognized. But this ground for rejecting the claim is not available in Bombay where female bandhus are recognised (s. 56 *infra*). The sister's daughter's claim was rejected on the ground that she was a collateral, her rival claimant being a descendant of the propositus. In a Madras case in which the succession opened before the passing of Act II of 1929, the rival claimants were (1) daughter's daughter's son and (2) sister's son. It was held that the former was entitled to preference (*x*).

51. Second and third rules laid down by the Judicial Committee.—In *Vedachela* v. *Subramania* (*y*), the claimants were (1) a maternal uncle (appellant) and (2) a paternal aunt's son's son (respondent). The Madras High Court held that the latter who is a bandhu ex parte paterna was entitled to succeed in preference to the former who was a bandhu ex parte materna. On appeal the Judicial Committee reversed the judgment of the High Court. Their Lordships observed "*In the absence of any express authority varying the rule, the propositions enunciated in Muttusami* v. *Muttukumarasami* (*z*), *which on appeal was affirmed by the Judicial Committee* (*a*), *furnish a safe guide.*"

The first two propositions have been already stated (s. 50). The next two propositions are :—

(3) That the examples given therein are intended to show the mode in which nearness of affinity is to be ascertained;

(4) That as between bandhus of the same class, the spiritual benefit they confer upon the propositus is, as stated in the Viramitrodaya, a ground of preference.

After stating their general approval of the propositions in the manner stated above, without quoting them, the Judicial Committee finally conclude thus :—

" In the present case before their Lordships, the appellant and the deceased were sapindas to each other ; and the appellant is undoubtedly nearer in degree to the deceased than Subramania. He also offers oblations to his father and grandfather to whom the deceased was also bound to offer pinda. The deceased thus shares the merit, resulting from the appellant's oblations to the manes of his ancestors whereas the father's sister's son's son offers no pinda to the deceased ancestors." In this manner their Lordships explain the third and fourth rules of the Madras High Court and restate them. They are : (1) the nearer in degree is preferable to the more remote ; (2) he who confers

(*x*) *Kalimuthu* v. *Ammamuthu* (1935) 58 Mad. 238, 153 I.C. 107, ('34) A.M. 611.

(*y*) (1921) 48 I.A. 349, 364, 44 Mad. 753, 767, 64 I.C. 402, ('22) A. PC. 33.

(*z*) (1893) 16 Mad. 23, 30.

(*a*) *Muthuswami* v. *Sunambedu* (1896) 23 I.A. 83, 19 Mad. 405.

spiritual benefit on the deceased is preferable to one who confers none. From the order in which these two rules are stated one may infer that the rules should be applied successively in the order in which they are mentioned. First, we must apply the rule based on nearness in degree. If this rule fails we must apply the rule based on superiority of spiritual benefit (*b*). The matter is made clearer by the next decision of the Judicial Committee. S. 51

In *Jotindra Nath Roy* v. *Nagendra Nath Roy* (*c*), in which the parties were governed by the Benares school of the Mitakshara, the contest was between the mother's sister's son and the father's half-sister's son, both *atma bandhus*, and the latter was preferred to the former on the ground of the superior spiritual efficacy of the pinda offered by him. In that case their Lordships of the Privy Council observed as follows :—

No doubt, propinquity in blood is the primary test, but . . . the Viramitrodaya brings in the conferring of spiritual benefit as the measure of propinquity where the degree of blood relationship furnishes no certain guide."

From the above two cases we get the following rules :—

(1) Propinquity in blood or nearness in degree gives a ground of preference (*d*).

(2) When it fails (and not until then), the conferring of spiritual benefit is a ground of preference (*e*).

It looks as if the phrases " nearness in degree ", " propinquity in blood ", and " degree of blood relationship " are used in the ordinary sense of the steps between the claimant and the propositus and not in the technical sense of ancient Hindu Lawyers. If so, the decision noted below is also an obvious case (*f*).

Spiritual efficacy as a ground of preference among bandhus.—In the last mentioned case, their Lordships observed (*g*), " Applying it to the parties in the present appeal, it is obvious that the respondents offer the full cake to the paternal grandfather and great-grandfather of the *propositus*, while the appellant offers it to his maternal grandfather, great-grandfather and great-great grandfather. Thus, no doubt, the appellant offers three cakes and the respondents only two. But the *propositus* participates only in oblations made to his three immediate paternal ancestors

(*b*) *Chengiah* v. *Subbaraya* (1930) 58 Mad. L. J. 562, 128 I.C. 172, ('30) A. M. 555, where the rival claimants are both matribandhus.

(*c*) (1932) 59 Cal. 576, 58 I. A. 372, 135 I. C. 637, ('31) A. PC. 268.

(*d*) *Balasubramanya Pandya Thalaivar* v. *Subbayya Thevar* (1938) 65 I. A. 93 (1938) Mad. 551 40 Bom. L. R. 704, 172 I. C. 724, ('38) A. PC. 34; *Debi Das* v. *Mukat Behari Lal* (1943) All. 131, 207 I.C. 17, ('43) A. A. 177. (An obvious case).

(*e*) *Ademma* v. *Hanuma Reddi* (1938) Mad. 260, ('37) A. M. 967.

(*f*) *Sobadri* v. *Shri Thakur Behariji Mahraji* (1943) All. 155, 206 I. C. 81, ('43) A. A. 87.

(*g*) *Jotindra Nath Roy* v. *Nagendra Nath Roy* (1932) 59 Cal. 576, 584, 58 I.A. 372, 135 I. C. 637, ('31) A. PC. 268, 271.

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and not in those made to his maternal ancestors. (Dr. Sarvadhikari's Principles of Hindu Law, 1st edition, pp. 817-8)......Apart from this, it seems to be well established that cakes offered to the paternal ancestors are of superior efficacy to those offered to maternal ancestors. This was laid down by a Full Bench of the Calcutta High Court in *Guru Gobind Shaha Mandal* v. *Anand Lal Ghose Mazumdar* (*h*). Their Lordships must, therefore, hold that the offerings made by the respondents confer a greater spiritual benefit upon the *propositus* than those made by the appellant, and that, taking this as a measure of propinquity, the respondents must be held to be the preferential heirs."

52. Fourth rule laid down by the Judicial Committee.—*Bandhus ex parte paterna and bandhus ex parte materna.*—It has been held by the High Courts of Madras (*i*) and Bombay (*j*), that bandhus *ex parte paterna* (*i.e.*, on the father's side), take before bandhus *ex parte materna* (*i.e.*, on the mother's side).

In *Vedachela*'s case (*k*), the Judicial Committee disapproved of the application of the rule where a different result would follow by reason of nearness in degree or superior spiritual efficacy. In the case of such a conflict, the rule in this section ought not to be applied ; where there is no such conflict, or where the other rules fail to furnish a guide, this rule may be applied. This is how the decision in *Balusami* v. *Narayana* (*l*) was distinguished by the Judicial Committee (*m*). There is nothing in the judgment of the Judicial Committee in that case to suggest that the rule of preference for bandhus *ex parte paterna* is not to be applied in any case. On the contrary, in a later case—*Jotindra Nath Roy* v. *Nagendra Nath Roy* (*n*), which was governed by the Benares School of Hindu Law, their Lordships observed that that rule was supported by a considerable volume of authority, such as Mayne (*o*), and Golapchandra Sarkar (*p*) who lay down the rule that as between bandhus of the *same class* and *equal in degree*, one related on the father's side is to be preferred to one related on the mother's side, and Bhattacharya's Commentaries which seem to take the same view (*q*). The contest in *Jotindra Nath Roy*'s case was between the father's half-sister's son and the mother's sister's son. Both were *atma bandhus* in *equal degree* of propinquity to the last owner. The father's half-sister's son was entitled to succeed in preference to the mother's

(*h*) (1870) 5 B. L. R. 15, 39, 13 W. R. 49 (F.B.).
(*i*) *Sundrammal* v. *Rangasami* (1895) 18 Mad. 193 ; *Balusami* v. *Narayana* (1897) 20 Mad. 342.
(*j*) *Saguna* v. *Sadashiv* (1902) 26 Bom. 710, 715.
(*k*) (1922) 48 I. A. 349, 44 Mad. 753, 64 I. C. 402, ('22) A. PC. 33.
(*l*) (1897) 20 Mad. 342.
(*m*) (1922) 48 I. A. 349, 359, 44 Mad. 753, 761, 762, 64 I. C. 402, ('22) A. PC. 33, *supra*.
(*n*) (1931) 58 I. A. 372, 59 Cal. 576, 135 I. C. 637, ('31) A. PC. 268.
(*o*) Hindu Law, 9th ed., sec. 579.
(*p*) Hindu Law, 7th edition, p. 574.
(*q*) 2nd Edition, 460.

sister's son, if the rule of preference of bandhus *ex parte paterna* were to be applied. He was also entitled to succeed if the test of spiritual efficacy were adopted. Their Lordships, however, thought that "the safer test" was that of spiritual efficacy, and decided on that ground in favour of the father's half-sister's son. Ss. 52, 53

In *Jotindra Nath Roy's* case (*r*) the Judicial Committee said: "It may well be that the application of a rule of general preference in the case of bandhus of those claiming *ex parte paterna*, will, in the majority of cases, produce the same result as the test of religious efficacy of offerings, but their Lordships think that, in adopting the latter.... they are on surer ground, and are following the precedent of previous rulings of this Board. There may be cases in which this rule (that is, the rule of spiritual efficacy) will leave the question still undecided, and in which the other rule (that is, the rule of preference of bandhus *ex parte paterna*) may have to be considered, but this is not so in the present case."

In the light of the two decisions of the Judicial Committee, the decision of the Madras High Court in *Sundarammal* v. *Rangasami* (*s*) must be regarded as overruled. But the decision in *Balusami* v. *Narayana* (*t*) is still good law. The actual decision was arrived at by the application of the principles (1) The nearer line excludes the more remote and (2) Bandhus *ex parte paterna* are preferred to the bandhus *ex parte materna*. Neither comparison of degrees nor of spiritual efficacy gives a different result. It is submitted that the decision is correct though different reasons might have been given.

Thus the fourth rule approved by the Judicial Committee is that bandhus *ex parte paterna* are preferred to bandhus *ex parte materna*. This rule must be applied only after the first three rules fail to furnish a guide.

53. Additional rules laid down by the High Courts.—(*1*) Leaving the case of descendants as settled for all practical purposes (s. 50A) on the principle that the nearer line excludes the more remote, the further question arises whether it can be applied as between collaterals of different lines. The question is of great practical importance and may frequently arise, among atma bandhus. We have already seen (s. 49) that atma bandhus who are not descendants may be divided into (1) Father's cognate descendants or father's line;

(2) Maternal grandfather and descendants of maternal and paternal grandfathers. The lines of the grandfathers, being equal in degree, may be regarded as one line.

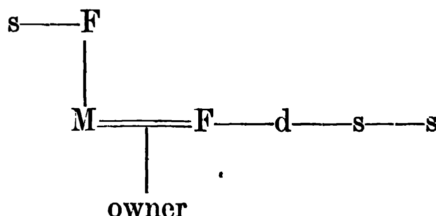
When the rival claimants belong to these two different lines, the question arises whether the principle that the nearer line excludes the more remote applies to them. Where the

(*r*) (1932) 59 Cal. 576, 58 I.A. 372, 135 I.C. 637, ('31) A. PC. 268.

(*s*) (1895) 18 Mad. 193.

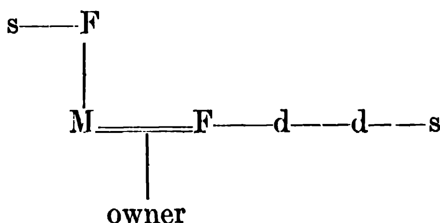
(*t*) (1897) 20 Mad. 342.

S. 53 claimants are equally removed from the propositus, it is reasonable that the rule should apply. But, suppose the claimant in the nearer line is more remotely removed than the claimant in the remoter line as in the following diagram:



In such a case who is the preferable heir? Though the actual point has not arisen before the Madras High Court, the trend of the decisions is in favour of holding that the nearer line excludes the more remote (*u*).

A contrary decision has been arrived at in the Patna High Court, where the rival claimants are as in the following diagram:



It was held by a majority of three that the maternal uncle is entitled to succeed (*v*). The point has not arisen before the Judicial Committee or the other High Courts. The Allahabad High Court has touched upon it but left it open as it did not arise for decision (*w*).

(3) All other considerations being equal, the claimant who is separated by only one female link is to be preferred to one who is separated by two such links (*x*). Another mode of expressing it is that two steps in cognateness are inferior to only one step in cognateness and one in agnateness (*y*).

(*u*) *Balusami* v. *Narayana* (1897) 20 Mad. 342; *Kalimuthu* v. *Ammamuthu* (1935) 58 Mad. 238, 246, 153 I.C. 107, ('34) A.M. 611.

(*v*) *Uma Shankar* v. *Mst. Nageshvari* (1918) 3 Pat. L.J. 663, 48 I.C. 625, ('18) A.P. 1.

(*w*) *Sobadri* v. *Shri Thakur Behariji Mahariji* (1942) A. L. J. 732, (1943) All. 155, 206 I. C. 81, ('43) A. A. 87.

(*x*) *Tirumalachariar* v. *Andal Ammal* (1907) 30 Mad. 406.

(*y*) *Rami Reddi* v. *Gangi Reddi* (1925) 48 Mad. 722, 87 I.C. 609, ('25) A.M. 807.

Ss. 53, 53A

It has thus been held that a *daughter's* son's son is to be preferred to a *daughter's daughter's* son (*z*). The mother's brother's son is preferred to mother's sister's son in Madras (*a*) and Allahabad (*b*). The Bombay High Court refused to follow the above rule and held that both were entitled to take equally (*c*). The decision seems to be of doubtful authority and, it is submitted, requires reconsideration. If it is supported on any doctrine peculiar to Bombay, it has to be confined to Bombay. Following the same rule it has been held by the High Court of Allahabad (*d*), that the father's father's *daughter's son's* son [s. 54, no. 23 at p. 67] is to be preferred to the father's *daughter's daughter's* son [s. 54, no. 7 at p. 66]. It is submitted that this case was erroneously decided. It was decided before the decisions of the Judicial Committee in *Vedachela* v. *Subramania* (*e*) and *Jatindranath Roy* v. *Nagendranath Roy* (*f*). The rule in this paragraph should not be applied before the earlier rules have been tested. Only when they fail to furnish a guide, should we proceed to this rule. If we apply the test of nearness in degree laid down by the Judicial Committee, the result would be different.

53A. A summing up of the rules as to the order of succession among the male bandhus has been attempted by the Madras High Court (*g*). They are to be applied in the order in which they are stated. The rules are :—

(*1*) Atma bandhus succeed in preference to pitri bandhus and matri bandhus.

(*2*) & (*3*) Among atma bandhus the nearer line excludes the more remote. This is sub-divided into—

(2) descendants are preferred to ancestors and collaterals ;

(3) father's descendants take before the descendants of grandfathers.

(*4*) Pitri bandhus succeed before the matri bandhus.

(*5*) Among the bandhus of the same or equal lines, the nearer excludes the more remote. If Rule 5 is to be applied before Rule 3, the decision in *Uma Shankar* v. *Nageshwari* (1918) 3 Pat. L. J. 663, 48 I.C. 625, ('18) A.P. 1 (*vide* S. 53) would be correct. But if Rule 3 is to be first applied it is incorrect.

(*6*) If the rule of nearness in blood fails to furnish a guide, he who confers a superior spiritual benefit is preferable to one who confers an inferior spiritual benefit or none.

(*z*) (1907) 30 Mad. 406, *supra*.
(*a*) (1925) 48 Mad. 722, 87 I.C. 609, ('25) A. M. 807, *supra*; *Appandai* v. *Bagu Bali* (1910) 33 Mad. 439, 5 I. C. 280, must be regarded as overruled.
(*b*) *Ram Charan Lal* v. *Rahim Baksh* (1916) 38 All. 416, 34 I.C. 108, ('17) A.A. 486.
(*c*) *Rajeppa* v. *Gangappa* (1923) 47 Bom. 48, 77 I.C. 219, ('22) A.B. 420.
(*d*) *Sham Dei* v. *Birbhadra Prashad* (1921) 43 All. 463, 62 I.C. 432, ('21) A.A. 178.
(*e*) (1922) 48 I.A. 349, 44 Mad. 753, 64 I.C. 402, ('22) A. PC. 33.
(*f*) (1931) 58 I.A. 372, 59 Cal. 576, 135 I.C. 637, ('31) A. PC. 268.
(*g*) *Kalimuthu* v. *Ammamuthu* (1935) 58 Mad. 238, 246, 153 I.C. 107, ('34) A.M. 611.

Ss. 53A-54

(7) When all the above rules do not work, bandhus *ex parte paterna* are preferred to bandhus *ex parte materna*.

(8) All other things being equal a claimant who is related to the propositus through the intervention of two females is to be postponed to one who is related through the intervention of only one female.

53B. The last rule laid down by the Judicial Committee.—Where we come to two equal claimants after the application of the above rules, one of whom is of whole blood and the other is of half blood, the former is preferred to the latter (*h*).

54. Order of succession among bandhus.—The following is the order of succession among bandhus [see Table on p. 70A below], based on rules in ss. 50—53A.

I.—*Atma bandhus.*

Descendants.

1. Son's daughter's son.
   Preferred in Bombay to father's daughter's daughter, on the principle that both being equally removed from the deceased, the one in the direct line of descent should be preferred to the one in a collateral line (s. 50A).
2. Daughter's son's son (inferior to 1 in spiritual benefit). Preferred by the Madras High Court to no. 3 [s. 53 (2)].
3. Daughter's daughter's son.
   Preferred by the Madras High Court to sister's son in a case before the Act of 1929 (*i*), and therefore, preferable to no. 4.
4. Lower descendants are not of practical importance.

Father's descendants.

5. Father's sons (=brother's) daughter's son.
6. Father's daughter's (=sister's) son's son.
   Preferred by the Madras High Court to no. 18 (*j*) and by the Allahabad High Court to no. 27 (*k*).
7. Father's daughter's daughter's son.
   Preferred by the Allahabad High Court to no. 20 (*l*).
8. Father's son's son's daughter's son.
9. Father's son's daughter's son's son.
*10. Father's daughter's son's son's son.
11. Father's son's daughter's daughter's son.
*12. Father's daughter's son's daughter's son.
*13. Father's daughter's daughter's son's son.
*14. Father's daughter's daughter's daughter's son.
14-A. Lower descendants of father who are bandhus in Madras but not in Allahabad.
15. Mother's father (=maternal grandfather).

(*h*) *Jatindranath Roy* v. *Nagendranath Roy* (1931) 58 I.A. 372, 59 Cal. 576, 135 I.C. 637, ('31) A. PC. 268.

(*i*) *Kalimuthu* v. *Ammamuthu* (1935) 58 Mad. 238, 153 I. C. 107, ('34) A.M. 611.

(*j*) *Balusami* v. *Narayana* (1897) 20 Mad. 342, 348.

(*k*) *Debi Das* v. *Mukat Behari Lal* (1943) All. 131, 207 I.C. 17, ('43) A.A. 177.

(*l*) *Sabodra* v. *Shri Thakur Behariji Mahraji* (1943) All. 155, 206 I.C. 81, ('43) A.A. 87.

Descendants of grandfathers. **S. 54**

16. Mother's father's son (=maternal uncle).
He succeeds before no. 17 (*m*) and before no. 19 (*n*).
17. Father's father's daughter's (=father's sister's or half-sister's) son.
He succeeds before no. 18 (*o*) and before no. 19 (s. 51).
18. Mother's father's son's son.
He succeeds before 19. (The decision in Bombay, holding that both take equally is either doubtful or must be limited to Bombay [s. 53 (*2*)]).
19. Mother's father's daughter's son.
20. Father's father's son's daughter's son (*p*).
21. Mother's father's son's son's son.
22. Mother's father's son's daughter's son.
23. Father's father's daughter's son's son.
It is submitted that the decision in *Sham Devi* v. *Birbhadra Prasad* (1921) 43 All. 463 is erroneous [s. 53 (*2*)] (*q*).
24. Father's father's daughter's daughter's son.
25. Mother's father's daughter's son's son.
26. Mother's father's daughter's daughter's son.
27. Father's father's son's son's daughter's son.
28. Mother's father's son's son's daughter's son.
29. Father's father's son's daughter's son's son.
*30. Father's father's daughter's son's son's son.
31. Father's father's son's daughter's daughter's son.
*32. Father's father's daughter's son's daughter's son.
*33. Father's father's daughter's daughter's son's son.
*34. Father's father's daughter's daughter's daughter's son.
35. Mother's father's son's son's son's son.
36. Mother's father's son's daughter's son's son.
*37. Mother's father's daughter's son's son's son.
38. Mother's father's son's daughter's daughter's son.
*39. Mother's father's daughter's son's daughter's son.
*40. Mother's father's daughter's daughter's son's son.
*41. Mother's father's daughter's daughter's daughter's son.
42. Father's father's son's son's daughter's son's son.
*43. Father's father's son's daughter's son's son's son.
*44. Father's father's daughter's son's son's son's son.
*45. Father's father's son's daughter's daughter's son's son.
46. Father's father's daughter's son's daughter's son's son.
*47. Father's father's daughter's daughter's son's son's son.
*48. Father's father's daughter's daughter's daughter's son's son.

(*m*) *Balasubrahmanya Pandya Thalaivar* v *Subbayya Tevar* (1938) 65 I. A. 93, (1938). Mad. 551, 40 Bom. L. R. 704, 172 I. C. 724, ('38) A. PC. 34; *Sakharam* v. *Balakrishna* (1925) 49 Bom. 739, 94 I. C. 817, ('25) A. B. 451, must be regarded as overruled; *Virangauda Lingangauda* v. *Yelappa Shidappa* (1943) Bom. 259, 205 I.C. 328, ('43) A. B. 56.

(*n*) *Mohandas* v. *Krishnabai* (1881) 5 Bom. 597.

(*o*) *Ademma* v. *Hanuman Reddi* (1938) Mad. 260, ('37) A. M. 967.

(*p*) The decision in *Sundarammal* v. *Rangasami* (1895) 18 Mad. 193, must be regarded as overruled.

(*q*) *United Provinces Through Deputy Commissioner Hardoi* v. *Kanhaiyalal & Ors* (1941) 16 Luck. 551, 192 I.C. 131, ('41) A. O. 337.

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*49. Mother's father's son's son's son's son's son.
50. Mother's father's son's son's daughter's son's son.
*51. Mother's father's son's daughter's son's son's son.
*52. Mother's father's daughter's son's son's son's son.
*53. Mother's father's son's daughter's daughter's son's son.
54. Mother's father's daughter's son's daughter's son's son.
*55. Mother's father's daughter's daughter's son's son's son.
*56. Mother's father's daughter's daughter's daughter's son's son.
*56-A. Seven descendants of father's father, a degree lower (sons of nos. 42-48).
*56-B. Eight descendants of mother's father, a degree lower (sons of nos. 49-56).

* These are held to be heirs in Madras but are held not to be heirs in Allahabad according to *Gajadharprasad*'s case.

According to the Patna view no. 15 will come between no. 3 and no. 4; no. 16 between no. 5 and no. 6; nos. 17, 18 and 19 between no. 8 and no. 9.

No. 28 is placed above Nos. 29 to 35 on account of his spiritual efficacy. It must be admitted that the result is highly anomalous. It is futile to discuss it unless the case actually arises.

II.—Pitri bandhus.

1. Father's maternal grandfather.
2. Father's maternal grandfather's son.
3. Father's paternal grandfather's daughter's son.
4. Father's maternal grandfather's son's son.
5. Father's maternal grandfather's daughter's son.
6. Father's paternal grandfather's son's daughter's son.
7. Father's paternal grandfather's daughter's son's son.
8. Father's maternal grandfather's son's son's son.
9. Father's paternal grandfather's daughter's daughter's son.
10. Father's maternal grandfather's son's daughter's son.
11. Father's maternal grandfather's daughter's son's son.
12. Father's maternal grandfather's daughter's daughter's son.
13. Father's paternal grandfather's son's son's daughter's son.
14. Father's paternal grandfather's son's daughter's son's son.
15. Father's paternal grandfather's daughter's son's son's son.
16. Father's maternal grandfather's son's son's son's son.
17. Father's paternal grandfather's son's daughter's daughter's son.
18. Father's paternal grandfather's daughter's son's daughter's son.
19. Father's paternal grandfather's daughter's daughter's son's son.
20. Father's maternal grandfather's son's son's daughter's son.
21. Father's maternal grandfather's son's daughter's son's son.
22. Father's maternal grandfather's daughter's son's son's son.
23. Father's paternal grandfather's daughter's daughter's daughter's son.
24. Father's maternal grandfather's son's daughter's daughter's son.
25. Father's maternal grandfather's daughter's son's daughter's son.
26. Father's maternal grandfather's daughter's daughter's son's son.
27. Father's maternal grandfather's daughter's daughter's daughter's son.
28. Father's paternal grandfather's son's son's daughter's son's son.

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29. Father's paternal grandfather's son's daughter's son's son's son.
30. Father's paternal grandfather's daughter's son's son's son's son.
31. Father's maternal grandfather's son's son's son's son's son.
32. Father's paternal grandfather's son's daughter's daughter's son's son.
33. Father's paternal grandfather's daughter's son's daughter's son's son.
34. Father's paternal grandfather's daughter's daughter's son's son's son.
35. Father's maternal grandfather's son's son's daughter's son's son.
36. Father's maternal grandfather's son's daughter's son's son's son.
37. Father's maternal grandfather's daughter's son's son's son's son.
38. Father's paternal grandfather's daughter's daughter's daughter's son's son.
39. Father's maternal grandfather's son's daughter's daughter's son's son.
40. Father's maternal grandfather's daughter's son's daughter's son's son.
41. Father's maternal grandfather's daughter's daughter's son's son's son.
42. Father's maternal grandfather's daughter's daughter's daughter's son's son.
43. Father's paternal grandfather's son's son's daughter's son's son's son.
44. Father's paternal grandfather's son's daughter's son's son's son's son.
45. Father's paternal grandfather's daughter's son's son's son's son's son.
46. Father's maternal grandfather's son's son's son's son's son's son.
47. Father's paternal grandfather's son's daughter's daughter's son's son's son.
48. Father's paternal grandfather's daughter's son's daughter's son's son's son.
49. Father's paternal grandfather's daughter's daughter's son's son's son's son.
50. Father's maternal grandfather's son's son's daughter's son's son's son.
51. Father's maternal grandfather's son's daughter's son's son's son's son.
52. Father's maternal grandfather's daughter's son's son's son's son's son.
53. Father's paternal grandfather's daughter's daughter's daughter's son's son's son.
54. Father's maternal grandfather's son's daughter's daughter's son's son's son.
55. Father's maternal grandfather's daughter's son's daughter's son's son's son.
56. Father's maternal grandfather's daughter's daughter's son's son's son's son.
57. Father's maternal grandfather's daughter's daughter's daughter's son's son's son.

III.—Matri bandhus.

1. Mother's paternal grandfather (*r*).
2. Mother's maternal grandfather.
3. Mother's paternal grandfather's son.
4. Mother's maternal grandfather's son.
5. Mother's paternal grandfather's son's son.
6. Mother's paternal grandfather's daughter's son (*s*).
7. Mother's maternal grandfather's son's son.
8. Mother's maternal grandfather's daughter's son.
9. Mother's paternal grandfather's son's son's son.
10. Mother's paternal grandfather's son's daughter's son.
11. Mother's paternal grandfather's daughter's son's son.
    He is preferred to No. 17 (*t*).
12. Mother's maternal grandfather's son's son's son.
13. Mother's paternal grandfather's daughter's daughter's son.
14. Mother's maternal grandfather's son's daughter's son.
15. Mother's maternal grandfather's daughter's son's son.
16. Mother's maternal grandfather's daughter's daughter's son.
17. Mother's paternal grandfather's son's son's son's son.
18. Mother's paternal grandfather's son's son's daughter's son.

(*r*) *Krishnayya* v. *Pichamma* (1888) 11 Mad. 287.

(*s*) *Adit Narayan* v. *Mahabir Prasad* (1921) 48 I.A. 86, 6 Pat. L. J. 140, 60 I. C. 251, ('21) A. PC. 53.

(*t*) *Chengiah* v. *Subbaraya* (1930) 58 Mad. L.J. 562, 128 I.C. 172, ('30) A.M. 555.

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19. Mother's paternal grandfather's son's daughter's son's son.
20. Mother's paternal grandfather's daughter's son's son's son.
21. Mother's maternal grandfather's son's son's son's son.
22. Mother's paternal grandfather's son's daughter's daughter's son.
23. Mother's paternal grandfather's daughter's son's daughter's son.
24. Mother's paternal grandfather's daughter's daughter's son's son.
25. Mother's maternal grandfather's son's son's daughter's son.
26. Mother's maternal grandfather's son's daughter's son's son.
27. Mother's maternal grandfather's daughter's son's son's son.
28. Mother's paternal grandfather's daughter's daughter's daughter's son.
29. Mother's maternal grandfather's son's daughter's daughter's son.
30. Mother's maternal grandfather's daughter's son's daughter's son.
31. Mother's maternal grandfather's daughter's daughter's son's son.
32. Mother's maternal grandfather's daughter's daughter's daughter's son.
33. Mother's paternal grandfather's son's son's son's son's son.
34. Mother's paternal grandfather's son's son's daughter's son's son.
35. Mother's paternal grandfather's son's daughter's son's son's son.
36. Mother's paternal grandfather's daughter's son's son's son's son.
37. Mother's maternal grandfather's son's son's son's son's son.
38. Mother's paternal grandfather's son's daughter's daughter's son's son.
39. Mother's paternal grandfather's daughter's son's daughter's son's son.
40. Mother's paternal grandfather's daughter's daughter's son's son's son.
41. Mother's maternal grandfather's son's son's daughter's son's son.
42. Mother's maternal grandfather's son's daughter's son's son's son.
43. Mother's maternal grandfather's daugther's son's son's son's son.
44. Mother's paternal grandfather's daughter's daughter's daughter's son's son
45. Mother's maternal grandfather's son's daughter's daughter's son's son.
46. Mother's maternal grandfather's daughter's son's daughter's son's son.
47. Mother's maternal grandfather's daughter's daughter's son's son's son.
48. Mother's maternal grandfather's daughter's daughter's daughter's son's son
49. Mother's paternal grandfather's son's son's son's son's son's son.
50. Mother's paternal grandfather's son's son's daughter's son's son's son.
51. Mother's paternal grandfather's son's daughter's son's son's son's son.
52. Mother's paternal grandfather's daughter's son's son's son's son's son.
53. Mother's maternal grandfather's son's son's son's son's son's son.
54. Mother's paternal grandfather's son's daughter's daughter's son's son's son.
55. Mother's paternal grandfather's daughter's son's daughter's son's son's son.
56. Mother's paternal grandfather's daughter's daughter's son's son's son's son.
57. Mother's maternal grandfather's son's son's daughter's son's son's son.
58. Mother's maternal grandfather's son's daughter's son's son's son's son.
59. Mother's maternal grandfather's daughter's son's son's son's son's son.
60. Mother's paternal grandfather's daughter's daughter's daughter's son's son's son.
61. Mother's maternal grandfather's son's daughter's daughter's son's son's son.
62. Mother's maternal grandfather's daughter's son's daughter's son's son's son.
63. Mother's maternal grandfather's daughter's daughter's son's son's son's son.
64. Mother's maternal grandfather's daughter's daughter's daughter's son's son's son.

The above lists are prepared on the basis of the decision and dictum in *Kesari Singh*'s case (*u*). But nos. 14A and 42-56B of the Atmabandus, nos. 28-57 of the Pitribandhus, nos. 33-64 of the Matribandhus would be excluded by *Brijmohan*'s case (*v*) and a few others by *Gajadharprasad*'s case (*w*).

(*u*) (1926) 49 Mad. 652, 95 I. C. 651, ('26) A. M. 881.

(*v*) (1938) A. L. J. 670, ('38) A. A. 443.

(*w*) (1932) 54 All. 698, 138 I.C. 561, ('32) A.A. 617.

55. Bandhus who are descendants of remoter ancestors.— S. 55
The bandhus for whom the order of succession is given in sec. 54, are all descendants of the great-grandfathers, the grandfathers and father of the propositus and of the propositus himself. It is necessary to consider the position in regard to the descendants of ancestors higher than the great-grandfathers, *vide* chart on page 70A. The first question that arises in respect of such bandhus is whether they fall under the heading Pitri bandhus and Matri bandhus or have to be classified into other classes. The importance of such a question may be illustrated thus:—Suppose the two rival claimants are (1) a descendant of mother's father's father and, therefore, admittedly a matri bandhu, and (2) a cognate descendant of father's father's father's father. If the latter must be regarded as a pitri bandhu he will be preferred to the former according to the decision in *Muthusami* v. *Muthukumarasami* (*x*). But it will be noticed that he is descended from an ancestor higher than the ancestor through whom the first claimant traces descent and he does not appear among the pitri-bandhus mentioned in sec. 49. If he falls under a different class which has to be given a different name such as (pitri-pitri bandhus), he, being descended from a remoter ancestor and not being a pitri bandhu, must yield to his rival.

The question has never arisen before the Courts and may never arise. An instance of such a person being regarded as a bandhu, but without any rival claimant is that of the father's father's father's father's son's son's daughter's son (*y*). Several judges in India have expressed the opinion that it is not possible to divide all bandhus into the three classes mentioned in the Mitakshara [sec. 46 (*4*)]. The Mitakshara itself does not say that all bandhus fall into three classes. Like the individual bandhus the classes mentioned in it may be regarded as illustrative and not as exhaustive. The opposite view is stated in the second proposition of the Madras High Court in *Muttusami* v. *Muttukumarasami* (*z*) which runs thus: "(2) That, as stated in the text of Vridha Satatapa or Baudhayana, *they are of three classes*.........."

(*x*) (1896) 19 Mad. 405, 23 I.A. 83.
(*y*) *Manick Chand* v. *Jagat Settani* (1890) 17 Cal. 518.
(*z*) (1893) 16 Mad. 23, 30.

Ss. 55, 56

It is true that the four propositions laid down in that case were generally approved in appeal and in *Vedachela* v. *Subramania* (*a*) by the Judicial Committee. But in none of these cases was it necessary to deal with the question and too much should not be attached to such general approval. It is submitted that bandhus descended from the higher ancestors should be classed into (1) pitri-pitri bandhus, (2) pitri-matri bandhus, (3) matri-pitri bandhus and (4) matri-matri bandhus and similarly for descendants of remoter ancestors (*b*). It is on the assumption that all bandhus fall into three classes that some of the reasoning of the Allahabad High Court in *Gajadhar Prasad* v. *Gavri Shankar* (*c*) is based.

56. Female bandhus in Bombay and Madras.—The bandhus mentioned in sec. 54 above are all males. The Mitakshara nowhere expressly mentions female bandhus. The nine instances there given are all instances of male bandhus. The Benares and Mithila schools follow the strict letter of the Mitakshara, and do not recognize females as bandhus. In Bombay and Madras, however, certain females are recognized as bandhus.

Every female other than the daughter in Madras, and other than the daughter, sister and father's sister, in Bombay who rank above bandhus, who, if she were a male, would have been an heir, that is, who is related to the propositus by birth, within the limits of degrees for bandhus is regarded as a heritable bandhu. The following are instances:—

IN BOMBAY.	IN MADRAS.
Brother's daughter (*d*).	Brother's daughter (*h*).
Sister's daughter (*e*).	Brother's son's daughter (*i*).
Paternal Uncle's daughter (*f*).	
Paternal grandfather's sister's son's daughter (*g*).	

(*a*) (1922) 48 I.A. 349, 359, 44 Mad. 753, 64 I.C. 402, ('22) A. PC. 33.

(*b*) *Umashankar* v. *Mussamat Nageswari* (1918) 3 Pat. L.J. 663, 48 I.C. 625, ('18) A.P. 1; *Rami Reddy* v. *Gangi Reddy* (1925) 48 Mad. 722, 87 I.C. 609, ('25) A.M. 807, 809, 810; *Kalimuthu* v. *Ammamuthu* (1935) 58 Mad 238, 153 I.C. 107, ('34) A.M. 611.

(*c*) (1932) 54 All. 698, 138 I. C. 561, ('32) A.A. 417.

(*d*) *Balkrishna* v. *Ramkrishna* (1921) 45 Bom. 353, 59 I.C. 771, ('21) A. B. 189.

(*e*) *Dattatreya* v. *Gangabai* (1922) 46 Bom. 541.

(*f*) *Kenchava* v. *Girimalappa* (1924) 51 I. A. 368, 48 Bom. 569, 82 I. C. 966, ('24) A. PC. 20 (postponed to father's sister's son).

(*g*) *Bai Vijili* v. *Bai Prabhalakshmi* (1907) 9 Bom. L. R. 1129.

(*h*) *Venkatasubramaniam* v. *Thayarammah* (1898) 2 Mad. 263.

(*i*) *Jagannathan* v. *Adilakshmi* (1940) Mad. 734, ('40) A. M. 545.

Under the Hindu Law of Inheritance (Amendment) Act 2 of 1929, *the son's daughter, the daughter's daughter and the sister* inherit with gotraja sapindas, the son's daughter succeeding immediately after the father's father, the daughter's daughter next after her, and the sister next after the daughter's daughter: see sec. 43, nos. 13A, 13B and 13C. In Bombay, the sister had a higher place even before the Act and retains it. As to half-sister, see sec. 43, 13C (2). **Ss. 56, 56A**

The female relations mentioned above are regarded as bandhus on the ground that "any relative who is also a cognate may be treated as coming within the definition of bhinna gotra sapinda, and that the term 'sapinda,' as used in chap. ii, sec. vi, of the Mitakshara, includes females" (*j*).

In Madras such females come after all the male bandhus (*k*). For the order in Bombay see sec. 74. Amongst themselves they succeed in the order of propinquity.

56A. Heirs of an illegitimate son.—When the illegitimate son of a woman dies leaving his mother but no nearer heirs, she is entitled to succeed as heir in accordance with the general principles of Hindu Law (*l*). The illegitimate sons of a prostitute, though by different fathers, are entitled to succeed to each other. Similarly, the legitimate son of one of such sons is entitled to succeed to them, and also to their legitimate sons (*m*). So if *A* and *B* are son and daughter of a woman living in adultery and *A* dies leaving *B* but no legitimate heirs, *B* is entitled to succeed to *A* (*n*).

In the Madras case (*o*) on which the present section is based Devadoss, J., said: "It is a misnomer to call the son of a dancing woman, whose paternity is unknown, an illegitimate son. The illegitimate son is one born out of wedlock, *i.e.*, no marriage was solemnized between the father and the mother. In the case of sons of prostitutes or dancing women the paternity is unknown and it is only an euphemism to call them illegitimate sons. In Roman law they are called *Nullius Filius*. Dancing women have their peculiar customs. Their status is recognized in Hindu society. Their customs have received the sanction of judicial decisions and the adoption of girls by them is recognized by law, and the daughters of dancing women inherit in preference to their sons."

The illegitimate son being an heir to his *father*, the father also is an heir to him provided, of course, the illegitimate son dies without leaving any issue, widow or mother (*p*).

(*j*) *Balamma* v. *Pullayya* (1895) 18 Mad. 168, 170.

(*k*) *Narasimha* v. *Mangammal* (1890) 13 Mad. 10; *Rajah Venkata* v. *Rajah Suraneni* (1908) 31 Mad. 321.

(*l*) *Jagarnath Gir* v. *Sher Bahadur Singh* (1935) 57 All. 85, 153 I.C. 1078, ('35) A.A. 329.

(*m*) *Viswanatha* v. *Doraiswami* (1925) 48 Mad. 944, 91 I.C. 193, ('26) A.M. 289.

(*n*) *Dattatreya* v. *Matha Bala* (1934) 58 Bom. 119, 114 I.C. 821, ('34) A. B. 36.

(*o*) (1925) 48 Mad. 944, 946, 91 I.C. 193, ('26) A.M. 289, *supra*.

(*p*) *Subramania* v. *Rathnavelu* (1918) 41 Mad. 44, 42 I.C. 556, ('18) A.M. 1346 [F.B.].

Ss. 57-59

57. Preceptor, disciple and fellow-student.—In default of kindred, the property of a deceased Hindu, even though he be a Sudra, passes to his preceptor; if there be no preceptor, to his disciple; and if there be no disciple, to his fellow-student. In determining who is a preceptor, a disciple or a fellow-student, the Court will only consider the imparting of purely religious instruction (*q*).

Mitakshara, ch. 2, sec. 7. In the Madras case referred to above, it was held that the disciple of an ascetic Sudra, who left no kindred, was entitled to succeed to his estate so as to prevent its escheat to Government.

58. Hermits and members of religious orders.—The heir to the property of a hermit (*Vanaprastha*) is his spiritual brother belonging to the same hermitage, to that of an ascetic (*Sanyasi*) a virtuous pupil, and to that of a student in theology (*Bramachari*) his religious preceptor. These heirs are entitled to succeed *in preference to the kindred* of the deceased. This rule applies only to members of the twice-born classes. It does not apply to Sudras unless some usage or custom to that effect is proved (*r*).

Mitakshara, ch. 2, sec. 8; see sec. 111 below. The heirs mentioned in sec. 57 are not entitled to succeed except *in default of* kindred. The present section deals exclusively with succession to the property of members of religious orders who belong to the twice-born classes. Sanyasis are members of the twice-born classes (*s*). The heirs enumerated in this section are entitled to succeed *in priority to* the kindred of the deceased.

59. Escheat.—(*1*) On failure of all the heirs mentioned above, the Crown takes by escheat (*t*). Where the Crown claims by escheat, the onus lies on the Crown to show that the last proprietor died without heirs (*u*).

(*2*) An estate taken by escheat is subject to the trusts and charges, if any, previously affecting the estate (*v*), *e.g.*, maintenance of widows (*w*) and mortgages created by a widow

(*q*) *Sambasiram* v. *Secretary of State for India* (1921) 44 Mad. 704, 63 I. C. 659, ('21) A.M. 537.

(*r*) *Ramdas* v. *Balderdasji* (1915) 39 Bom. 168, 26 I.C. 607. ('14) A. B. 116 [Sanyasi]; *Dharmapuram* v. *Virapandiyam* (1899) 22 Mad. 302 [Sudra]; *Collector of Dacca* v. *Jagat Chunder* (1901) 28 Cal. 608 [claim of preceptor's preceptor allowed as proved by custom]; *Haris Chandra* v. *Atir Mahomed* (1913) 40 Cal. 545, 18 I.C. 474 [Sudra]; *Somasundaram* v. *Vaithilinga* (1917) 40 Mad. 846, 41 I.C. 546, ('18) A.M. 794 [Sudra]; *Sobhaddi* v. *Gobind* (1924) 46 All. 616, 80 I. C. 579, ('24) A.A. 742.

(*s*) (1915) 39 Bom. 168, 174, 26 I.C. 607, ('14) A.B. 116, *supra*.

(*t*) *Collector of Masulipatam* v. *Cavaly Venkata* (1860) 8 M.I.A. 500.

(*u*) *Gridhari Lall* v. *Bengal Government* (1868) 12 M.I.A. 448, 10 W. R. (P.C.) 52; *Ganpat* v. *Secretary of State* (1921) 45 Bom. 1106, 1110, 62 I.C. 109, ('21) A.B. 138; United Provinces through Deputy Commissioner *Hardoi* v. *Kanhaiyalal & Ors.* (1941) 16 Luck. 551, 192 I.C. 131, ('41) A.O. 337.

(*v*) (1860) 8 M.I.A. 500, 527, *supra*.

(*w*) *Golab Koonwar* v. *Collector of Benares* (1847) 4 M.I.A. 246, 258.

for legal necessity (*x*), but not to unauthorized alienations by widows (*y*). Ss. 59, 60

Succession after Reunion.

60. Order of Succession among reunited members.— In Madras, it has been held that the share of a reunited member survives to the other members of the reunited family like the share of a member of a normal joint family (*z*).

In Calcutta the opinion has been expressed that the principle of survivorship applies to reunited coparceners (*a*).

The Madras High Court has expressed the opinion that a reunited son has a preferential right of inheritance to one who remains separate (*b*).

The following is the order of succession according to Viramitrodaya:

(1-3) Son, grandson and great-grandson ;
(4) reunited whole brother ;
(5) reunited half-brother and separated full-brother (*c*) ;
(6) reunited mother ;
(7) reunited father ;
(8) any other reunited coparcener ;
(9) half-brother not reunited ;
(10) mother not reunited ;
(11) father not reunited ;
(12) widow ;
(13) daughter ;
(14) daughter's son ;
(15) sister.

Subject to the above, the succession goes to the sapindas, samanodakas and bandhus in the order and according to the rules set forth in secs. 43, 45 and 50 (*d*).

As to reunion, see secs. 342-344.

The order of succession, according to the Smriti Chandrika, is as follows : (1) son, grandson, great-grandson, (2) reunited full-brother, (3) separated full-brother, (4) reunited half-brother, (5) reunited father or paternal uncle, (6) separated half-brother, (7) father, (8) mother, (9) virtuous widow, (10) sister, (11) sapindas, and (12) samanodakas.

According to the Mayukha, the reunited member has in every case preference over the unreunited. But when there are separated full-brothers and reunited half-brothers, uncles and the like, the separated full-brother, etc., takes equally with the reunited half-brother, etc. After the brother, the mother takes, then the father, then the widow, then the sister, then the daughter, and after her the nearest sapinda.

See Ghose's Hindu Law, 3rd ed., pp. 625-626.

(*x*) *Cavaly Venkata* v. *Collector of Masulipatam* (1867) 11 M.I.A. 619.
(*y*) (1860) 8 M.I.A. 500, 527, *supra*.
(*z*) *Samudrala* v. *Samudrala* (1910) 33 Mad. 165, 3 I.C. 741.
(*a*) *Jasoda* v. *Sheo* (1890) 17 Cal. 33; *Sham* v. *Court* (1873) 20 W.R. 197.
(*b*) *Nana* v. *Ramchandra* (1909) 32 Mad. 377, 382, 383, 2 I.C. 519.
(*c*) *Ran asami* v. *Venkatesam* (1893) 16 Mad. 440.
(*d*) Sarkar's Hindu Law, 7th ed., p. 587.

CHAPTER V.
FEMALE HEIRS.

Ss. 61, 61A

61. Female heirs: Bengal school.—According to the Bengal school no female could inherit to a male unless she is expressly named as an heir in the texts. The result is that the only females recognized as heirs in that school are (1) the widow, (2) the daughter, (3) the mother, (4) the father's mother, and (5) the father's father's mother (*e*).

61A. Female heirs: Mitakshara school.—(*1*) Before the Hindu Law of Inheritance (Amendment) Act, 1929, the only females recognized as heirs in the Benares (*f*) and Mithila schools were (1) the widow, (2) the daughter, (3) the mother, (4) the father's mother, and (5) the father's father's mother. The exclusion of other females was founded on a text of Baudhayana which says: "Women are devoid of the senses, and incompetent to inherit" (*g*). Accordingly it has been held in Lahore that a sister's son's daughter is not an heir (*h*).

Neither the Madras nor the Bombay school follow the text of Baudhayana. These schools follow the text of Manu which says: "To the nearest sapinda the inheritance next belongs", and they interpret the word "sapinda" to include females also (*i*). On that interpretation the Madras school has held that the brother's daughter, sister's daughter, brother's son's daughter and father's sister are also heirs in the Madras Presidency [sec. 56]. The Bombay school has gone much further, and it includes in the list of female heirs not only the heirs recognized in the Benares, Mithila and Madras schools, but also widows of gotraja sapindas [sec. 68]. The recognition of widows of gotraja sapindas as heirs in Bombay has been placed by the Privy Council on the ground of usage (*j*). But the widows of bandhus are not recognized as heirs anywhere; for instance, a sister's son's widow (*k*).

(*2*) Under the Hindu Law of Inheritance (Amendment) Act, 1929, which came into force on the 21st February 1929, the son's daughter, the daughter's daughter, and the sister (S. 43-13 A to C) rank as heirs in *all* parts of British India where

(*e*) *Guru Gobind* v. *Anand Lal* (1870) 5 Beng. L.R. 15, 37 [F.B.].

(*f*) *Jugan Nath* v. *Champa* (1906) 28 All. 307; *Srimati Krishna* v. *Bhaiya-Rajendra* (1927) 2 Luck. 43, 104 I.C. 155, ('27) A.O. 240; *Jang Bir* v. *Mst. Jamna* (1931) 12 Lah. 534, 135 I.C. 593, ('32) A. L. 37 [sister not an heir].

(*g*) *Lallubhoy* v. *Cassibai* (1880) 5 Bom. 110, 118, 7 I.A. 212, 231.

(*h*) *Rameshwar* v. *Mst. Ganapati Devi* (1937) Lah. 525, 166 I.C. 753, ('36) A.L. 652.

(*i*) *Balamma* v. *Pullayya* (1895) 18 Mad. 168, 170.

(*j*) (1880) 5 Bom. 110, 7 I.A. 212, 237, *supra*.

(*k*) *Rameshwar* v. *Mst. Ganapati Devi* (1937) Lah. 525, 166 I.C. 753, ('36) A.L. 652.

the *Mitakshara law* prevails. Before the Act they ranked as heirs only in the Bombay [s. 56 (1)] and Madras [s. 55] Presidencies. **Ss. 61A-64**

Before the Act, both the son's daughter and the daughter's daughter ranked as bandhus in Bombay and Madras. Under the Act, however, they both inherit as gotraja sapindas [s. 43, nos. 13A and 13B]. As regards the sister, she succeeded in Bombay immediately after the paternal grandmother, and in Madras she succeeded as a bandhu. As regards her place in the order of inheritance in Bombay, the Act effects no change, and she will succeed immediately after the paternal grandmother as she did before the Act [s. 65]. In Madras, however, she will, since the Act, succeed immediately after the daughter's daughter [s. 43, no. 13C].

62. Female heirs in Benares and Mithila.—The only females recognized as heirs in the Benares and Mithila schools before the Hindu Law of Inheritance (Amendment) Act of 1929 were (1) the widow, (2) the daughter, (3) the mother, (4) the father's mother, and (5) the father's father's mother. No other female was recognized as an heir (*l*). Under the Act, the son's daughter, the daughter's daughter, and the sister also rank as heirs [s. 43, nos. 13A, 13B and 13C].

63. Female heirs in Madras.—The Madras school recognizes not only the widow, daughter, mother, father's mother, and father's father's mother as heirs, but also the females mentioned in sec. 56 above. This includes the son's daughter, daughter's daughter and sister who are now expressly named as heirs in the Hindu Law of Inheritance (Amendment) Act 2 of 1929, see sec. 61A above. The Madras school does not admit the widows of gotraja sapindas as heirs (*m*).

64. Female heirs in Bombay.—The Bombay school recognizes not only the widow, daughter, mother, father's mother and father's father's mother as heirs, but also the following females :—

(*1*) *Sister*, whether of the whole or half-blood. The sister is considered a sapinda by virtue of her affinity to her brother. She is also considered a gotraja sapinda as having been born in her bother's *gotra* or family (*n*) [s. 65].

(*l*) *Tirath Ram* v. *Mst. Kahan Devi* (1920) 1 Lah. 588, 593-594, 60 I.C. 101, ('21) A.L. 149; *Mst. Sujan Devi* v. *Javiri Mal* (1920) 1 Lah. 608, 59 I.C. 124, ('20) A.L. 514.

(*m*) *Balamma* v. *Pullava* (1895) 18 Mad. 168 [widow of great-grandson of great-grandfather of the deceased not an heir]; *Kanakammal* v. *Ananthamathi* (1914) 37 Mad. 293, 25 I. C. 901, ('15) A. M. 18 [brother's widow not an heir].

(*n*) *Kesserbai* v. *Valab* (1880) 4 Bom. 188.

S. 64 Half-sisters succeed as much as sisters of the whole blood [s. 66]. The sister is now expressly mentioned as an heir in the Hindu Law of Inheritance (Amendment) Act 2 of 1929 [s. 43 (13 *C*)].

The Mayukha expressly names the sister as an heir. The Mitakshara does not name the sister, but certain commentators of repute, such as Balambhatta and Nanda Pandita, say that in the term "brothers" whom the Mitakshara does name, sisters are included (*o*). She is also expressly mentioned as an heir in Nilkhantha's Commentary.

The paternal uncle's daughter is not a gotraja sapinda (*p*), but a bandhu [s. 56].

(2) *Father's sister*, whether of the whole or half blood.—See s. 74.

(3) *Widows of predeceased gotraja sapindas*, that is, of sapindas and samanodakas (*q*), but not widows of bandhus or bhinna-gotraja sapindas (*r*). Thus the son, the father, the brother, the brother's son, the paternal uncle, the paternal uncle's son, are all gotraja sapindas of the deceased. Therefore, according to the Bombay decisions, the son's widow (*s*), the step-mother (father's widow) (*t*), the brother's widow (*u*), the brother's son's widow (*v*), the paternal uncle's widow (*w*), and the widow of the paternal uncle's son (*x*), are all *sagotra sapindas* of the deceased, and inherit as such. These widows, being *sagotra sapindas*, inherit necessarily before the bandhus. The above list is not exhaustive, but merely illustrative. See sec. 68.

The widows of gotraja sapindas are recognized as heirs in the Bombay Presidency only. They were not regarded as heirs elsewhere (*y*). Act XVIII of 1937 now makes the widow of a predeceased son and the widow of predeceased son's predeceased son heirs throughout India except under the Dayabhaga School.

A gotraja sapinda is one *born* in the *gotra* or family of the deceased. The expression *sagotra sapinda* means of the same gotra and includes females that enter the *gotra* of the deceased by marriage.

(4) *Female bandhus mentioned in section 56 above.*—These include the son's daughter and daughter's daughter, both of whom are now expressly mentioned in the Hindu Law of Inheritance (Amendment) Act 2 of 1929. But they now inherit with gotraja sapindas [s. 43, nos. 13A and 13B].

(*o*) *Kesserabai* v. *Valab* (1880) 4 Bom. 188, 197, 204.

(*p*) *Krishnabai* v. *Keshav* (1920) 22 Bom. L.R. 1162, 59 I.C. 511, ('20) A.B. 237.

(*q*) *Lallubhoy* v. *Cassibai* (1880) 5 Bom. 110, 7 I.A. 212; *Lakshmibai* v. *Jayram* (1869) 6 Bom. H.C. 152.

(*r*) *Vallabhdas* v. *Sakarbai* (1901) 25 Bom. 281.

(*s*) *Roopchand* v. *Poolchand* (1824) 2 Bor. 670.

(*t*) (1880) 4 Bom. 188, 208, *supra*.

(*u*) *Nahalchand* v. *Hemchand* (1885) 9 Bom. 31.

(*v*) *Madhavram* v. *Dave* (1897) 21 Bom. 739.

(*w*) *Rachava* v. *Kalingapa* (1892) 16 Bom. 716; *Raghunath Shankar* v. *Laxmibai* (1935) 59 Bom. 417, 37 Bom. L. R. 150, 157 I. C. 658, ('35) A. B. 298.

(*x*) (1880) 5 Bom. 110, 7 I. A. 212, *supra*.

(*y*) *Ananda Bibee* v. *Nownit Lal* (1883) 9 Cal. 315, 317-22; *Balamma* v. *Pullayya* (1895) 18 Mad. 168; *Thayammal* v. *Annamala* (1896) 19 Mad. 35; *Kanakammal* v. *Ananthamathi* (1914) 37 Mad. 293, 25 I.C. 901, ('15) A.M. 18.

65. Sister's place as an heir in the Bombay Presidency.— (*1*) A sister is an heir in the Bombay Presidency [s. 64 (1)], and she inherits immediately after the paternal grandmother both under the Mayukha and the Mitakshara as interpreted in Bombay (*z*). Her place in the order of succession is not affected by the Hindu Law of Inheritance (Amendment) Act 2 of 1929 [s. 43 (*13C*)]. See s. 72 (*12*) and s. 77 (*12*). **Ss. 65-67**

Both under the Mayukha and the Mitakshara as interpreted in Bombay, a sister does not take before a full-brother's son (*a*). In cases governed by the Mayukha, she takes even before a half-brother (*b*), and half-brother's son (*c*), but not in cases governed by the Mitakshara (*d*). See ss. 72 and 77 below.

The sister takes before a paternal uncle (*e*), a paternal uncle's son (*f*), a paternal uncle's son's son (*g*), or a more remote paternal male relative (*h*). She also takes before a son's widow (*i*), a step-mother (*j*), a brother's widow (*k*), or a paternal uncle's widow (*l*) all of whom are widows of gotraja sapindas [s. 68]. She also succeeds in preference to a paternal step-grandmother (*m*).

(*2*) Sisters take absolute estates in severalty, and not as joint tenants in Bombay (*n*).

66. Half-sister as an heir in the Bombay Presidency.—A half-sister is an heir in the Bombay Presidency and she inherits, in cases governed by the Mitakshara, immediately after the full-sister (*o*), and in cases governed by the Mayukha after the half-brother (*p*). Her place in the order of succession is not affected by the Hindu Law of Inheritance (Amendment) Act 2 of 1929 [s. 43 (*13C*)].

A half-sister takes before a step-mother (*q*), a paternal uncle (*r*), or a paternal uncle's widow (*s*).

67. Father's sister as an heir in the Bombay Presidency.— See s. 74.

(*z*) West and Bühler, 4th ed., 109-110; *Venayeck* v. *Luxumeebaee* (1864) 9 M.I.A. 520 in App. from 1 Bom. H. C. 117 [a Mayukha case]; *Lallubai* v. *Mankuvarbai* (1878) 2 Bom. 388, 421, 445-446; *Kesserbai* v. *Valab* (1880) 4 Bom. 188; *Vithaldas* v. *Jeshubai* (1880) 4 Bom. 219, 221; *Bhagwan* v. *Warubai* (1908) 32 Bom. 300.

(*a*) *Mulji* v. *Cursandas* (1900) 24 Bom. 563.

(*b*) *Sakharam* v. *Sitabai* (1879) 3 Bom. 353.

(*c*) (1908) 32 Bom. 300, *supra*; *Hari Annaji* v. *Vasudev* (1914) 38 Bom. 438, 441, 23 I.C. 944, ('14) A.B. 134.

(*d*) West and Bühler, 4th ed., 105-106; (1900) 24 Bom. 563, 573, 579, *supra*; (1914) 38 Bom. 438, 23 I.C. 944, ('14) A.B. 134, *supra*.

(*e*) See *Trikam* v. *Natha* (1912) 36 Bom. 120, 12 I.C. 359 [half-sister Mayukha].

(*f*) (1864) 9 M.I.A. 520, in App. from 1 Bom. H.C. 117, *supra*.

(*g*) *Biru* v. *Khandu* (1880) 4 Bom. 214.

(*h*) *Dhondu* v. *Gangabai* (1879) 3 Bom. 369.

(*i*) *Vithaldas* v. *Jeshubai* (1880) 4 Bom. 219, 221.

(*j*) *Lakshmi* v. *Dada* (1879) 4 Bom. 210.

(*k*) *Rudrapa* v. *Irava* (1904) 28 Bom. 82.

(*l*) (1880) 4 Bom. 188, *supra*.

(*m*) *Lingangowda* v. *Tulsawa* (1915) 17 Bom. L.R. 315, 28 I.C. 588, ('15) A.B. 48.

(*n*) *Rindabai* v. *Anacharya* (1891) 15 Bom. 206.

(*o*) West and Bühler, 2nd ed., p. 186; *Jana* v. *Rakhma* (1919) 43 Bom. 461, 52 I.C. 8, ('19) A.B. 12.

(*p*) (1880) 4 Bom. 188, 207-209, *supra*.

(*q*) (1880) 4 Bom. 188, *supra*.

(*r*) (1912) 36 Bom. 120, 12 I.C. 359, *supra*.

(*s*) (1880) 4 Bom. 188, *supra*.

S. 68

68. Widows of gotraja sapindas as heirs in the Bombay Presidency.—The succession of widows of gotraja sapindas [sec. 64 (*3*)] is governed by the following rules :—

(*i*) No widow of a gotraja sapinda can inherit until after "the compact series of heirs" [ending with the brother's son (*t*)], nor until after the sister and half-sister (*u*).

(*ii*) Subject to the above rule and provided that there is no existing male gotraja sapinda within the six degrees of the line to which her husband belonged (*v*), the widow of a gotraja sapinda stands in the same place as her husband, if living, would have occupied.

(*iii*) Where the contest lies between the widow of a gotraja sapinda representing a nearer line and a male gotraja sapinda representing a remoter line, the former inherits by preference over the latter (*w*).

(*iv*) Widows of gotraja sapindas may succeed to the estate of a male or to that of a female. In the former case, they take a widow's estate ; in the latter, an absolute estate [secs. 170 (*2*), 171 (*2*)].

(*v*) A widow who has remarried is not entitled to inherit as a gotraja sapinda in the family of her first husband (*x*). But unchastity at the time when the succession opens is not a disqualification to inherit as a gotraja sapinda (*y*).

The series of heirs beginning with the son and ending with the brother's son is called "the compact series of heirs." No widow of a gotraja sapinda can inherit before any of these heirs (*z*). Nor can she inherit before the sister or half-sister (*a*). A son is the nearest male gotraja sapinda of the deceased owner ; therefore, the first in the series of widows of gotraja sapindas is the son's widow (*b*). Then comes the grandson's widow, and then the great-grandson's widow.

(*t*) *Nahalchand* v. *Hemchand* (1885) 9 Bom. 31, 34 (note).

(*u*) *Vithaldas* v. *Jashubai* (1880) 4 Bom. 219, 221. Note that the son's widow is the first in the series of widows of gotraja sapindas.

(*v*) *Lallubhoy* v. *Cassibai* (1880) 5 Bom. 110, 7 I.A. 212, in app. from 2 Bom. 388 ; *Kachara* v. *Kalingapa* (1892) 16 Bom. 716, 720 ; *Kashibai* v. *Moreshwar* (1911) 35 Bom. 389, 11 I.C. 560 ; *Basangavda* v. *Basangavda* (1915) 39 Bom. 87, 127 I.C. 167, ('14) A.B. 202 ; *Ambaidas* v. *Jijibhai* (1912) 14 Bom. L. R. 261, 14 I.C. 979 [a Mayukha case].

(*w*) (1892) 16 Bom. 716, 718, *supra* ; (1915) 39 Bom. 87, 27 I.C. 167, ('14) A. B. 202, *supra*.

(*x*) *Pranjivan* v. *Bai Bhiki* (1921) 45 Bom. 1247, 63 I.C. 947, ('21) A.B. 57.

(*y*) *Akoba Laxman* v. *Sai Genu* (1941) Bom. 438, 197 I.C. 157, ('41) A.B. 204.

(*z*) (1885) 9 Bom. 31, 34 (note), *supra*.

(*a*) (1880) 4 Bom. 219, 221, *supra*.

(*b*) (1880) 4 Bom. 219, 221, *supra*.

The male next after the great-gandson is the daughter's son. But he is not a gotraja sapinda, for he belongs to a different *gotra* or family. **Ss. 68-70**

The next male is the father. The male gotraja sapindas of the deceased in his father's line are his (1) brother, (2) brother's son, (3) brother's son's son, (4) brother's son's son's son, (5) brother's son's son's son's son, and (6) brother's son's son's son's son's son. The father's line begins with the father and ends with the brother's son's son's son's son's son. The father being the first in his line, the step-mother (father's widow) is the first in the series of widows of gotraja sapindas in the father's line, and she takes before the brother's widow who is the second in the said series. But she is not entitled to inherit if there exists any lineal descendant of the father as far as the *sixth* degree, that is, if there be a brother, a brother's son, a brother's son's son, a brother's son's son's son, a brother's son's son's son's son, or a brother's son's son's son's son's son. See cl. (ii) of this section.

Suppose now that the contest is between a brother's widow and a paternal uncle. The husband of the brother's widow, that is, the brother, belongs to the father's line and the paternal uncle belongs to the father's father's line, that is, a remoter line. The brother's widow is therefore entitled to succeed before the paternal uncle. See cl. (iii) of this section.

Foundation of the right of widow of predeceased gotraja sapindas to inherit.—The right of these females to inherit rests mainly on the ground of positive acceptance and usage (*c*).

Illustration.

A dies leaving a widow, a widow of a predeceased brother, and a paternal uncle. On *A*'s death, his widow will succeed to the estate. The next heir, on the widow's death, is the widow of *A*'s brother, and not the paternal uncle of *A*, the reason being that the husband of *A*'s brother's widow (that is, *A*'s brother) belongs to *A*'s *father*'s line, while *A*'s paternal uncle belongs to *A*'s *father*'s *father's* line which is a remoter line. On the death, however, of the brother's widow, the heir to *A*'s estate will be his paternal uncle. *A*'s widow takes a widow's estate in her husband's property. The brother's widow also takes a widow's estate [s. 170]. The paternal uncle takes the property absolutely and on his death it will pass to his own heirs.

69. Widows of samanodakas as heirs in the Bombay Presidency.—The widows of predeceased samanodakas [s. 40] are held to be heirs in the Bombay Presidency (*d*).

70. Daughters of descendants, ascendants and collaterals as heirs in the Bombay Presidency.—The female descendants of the propositus and of his ancestors are bandhus in the Bombay Presidency [s. 56].

(c) *Lulloobhoy* v. *Cassibai* (1880) 7 I. A. 212, 237, 5 Bom. 110, 124.

(d) *Lakshmibai* v. *Jayram* (1869) 6 Bom. H. C. A. C. 152.

CHAPTER VI.

ORDER OF SUCCESSION TO MALES IN THE BOMBAY PRESIDENCY.

Ss. 71, 72

71. Succession in the Bombay Presidency.—(*1*) The order of succession to males in the Bombay Presidency is different from that in other parts of British India where the Mitakshara law prevails. The difference arises from the fact that the Bombay school recognizes as heirs certain females who are not recognized as heirs in other parts of British India [ss. 64-70].

(*2*) In the Bombay Presidency itself there is a difference between the order of succession in cases governed by the Mitakshara and that in cases governed by the Mayukha [s. 12 (*2*)].

72. Order of succession in cases governed by the Mitakshara.—The following is the order of succession to males among sapindas in the Bombay Presidency in cases governed by the Mitakshara:—

1-6. Son, son's son (whose father is dead), and son's son's son (whose father and grandfather are both dead). These inherit simultaneously. Under Act XVIII of 1937 the widow, the predeceased son's widow, and the widow of a predeceased son of a predeceased son, are also recognized as heirs. (See sec. 43.)

See notes to s. 43, nos. 1—3 and 4.

7. Daughter—

See s. 43, no. 5, notes (1), (5), (6) and (7).

In the Bombay Presidency, daughter's do not take as joint tenants with benefits of survivorship, but they take as tenants-in-common. 'Further, a daughter in that Presidency does not take a limited estate in her father's property, but takes the property absolutely. Thus if a Hindu governed by the Bombay school dies leaving two daughters, each daughter takes an *absolute* interest in a moiety of her father's estate, and holds it as her *separate* property, and on her death her share will pass to her own heirs as her stridhan (*e*) [s. 170].

8. Daughter's son—

See notes to s. 43, no. 6.

(*e*) *Bhagirthibai* v. *Kahnujirav* (1887) 11 Bom. 285; *Gulappa* v. *Tayawa* (1907) 31 Bom. 453; *Vithappa* v. *Savitri* (1910) 34 Bom. 510, 7 I.C. 445.

S. 72

9. Mother—

See notes to s. 43, no. 7.

As to a step-mother see no. 27 (post).

10. Father.

11. Brother—

(*i*) of the whole blood.

(*ii*) of the half-blood.

A brother of the full blood succeeds before a brother of the half-blood See notes to s. 43, no. 9; see also s. 44.

12. Brother's son—(*e1*)

(*i*) of the whole blood.

(*ii*) of the half-blood.

Sons of brothers of the whole blood succeed before sons of brothers of the half-blood. See notes to s. 43, no. 10; see also s. 44.

13. Grandmother (father's mother)—

See note to no. 14 below.

14. Full sister—

Her place in the order of succession is not affected by the Hindu Law of Inheritance (Amendment) Act 2 of 1929 [s. 43 (13C)]. See s. 64 (1) and s. 65.

15. Half-sister—

See s. 43, No. 13C, s. 64 (1) and s. 66.

The three remote descendants of the deceased.

16. Great-great-grandson—

It is not settled whether nos. 16, 17 and 18 succeed before or after no. 19. In *Appaji* v. *Mohanlal* (*f*), the question was raised, but not decided.

17. Great-great-great-grandson.

18. Great-great-great-great-grandson.

Widows of 4 male lineal descendants of the deceased.

19. Great-grandson's *widow*.

(*e1*) *Nahalchand* v. *Hemchand* (1885) 9 Bom. 31 (takes before brother's son's widow).

(*f*) (1930) 54 Bom. 564, 611, 127 I.C. 385, ('30) A.B. 273 [F.B.].

S. 72

20. Great-great-grandson's *widow*.

21. Great-great-great-grandson's *widow*.

22. Great-great-great-great-grandson's *widow*.

The 4 remote descendants of the brother.

23. Brother's son's son.

He does not succeed before but succeeds after thes on's widow (i) [no. 17].

24. Brother's son's son's son.

25. Brother's son's son's son's son.

26. Brother's son's son's son's son's son.

Widows of father, brother and brother's descendants.

27. Step-*mother* (*g*).

28. Brother's *widow* (*h*).

29. Brother's son's *widow* (*i*).

30. Brother's son's son's *widow*.

31. Brother's son's son's son's *widow*.

32. Brother's son's son's son's son's *widow*.

33. Brother's son's son's son's son's son's *widow*.

Father's father and his 6 descendants.

34. Father's father.

34A. *Son's daughter.*
34B. *Daughter's daughter.*
34C. *Sister's son* (*j*).

} **See s. 43, nos. 13A, 13B and 13D.**

35. Paternal uncle.

(1) of the whole blood. **(2) of the half-blood.**

36. Paternal uncle's son.

He takes before no. 42. (*Rachava* v. *Kalingapa* (1892) 16 Bom. 716).

(*g*) ***Rakhmabai*** **v.** ***Tukaram*** **(1887) 11 Bom. 47 takes before half-brother's widow ;** ***Russobai*** **v.** ***Zoolekhabai*** **(1895) 19 Bom. 707 (takes before paternal uncle's son).**

(*h*) ***Basangavda*** **v.** ***Basangavda*** **(1915) 39 Bom. 87, 27 I.C. 167, ('14) A.B. 202 (takes before pat. uncle's son).**

(*i*) ***Madhavaram*** **v.** ***Dave*** **(1897) 21 Bom. 739.**

(*j*) ***Ambabai*** **v.** ***Keshai Bandochand*** **(1941) Bom. 250, 195 I.C. 172, ('41) A.B. 233.**

37. Paternal uncle's son's son. **S. 72**

He takes before no. 42. (*Kashibai* v. *Moreshwar* (1911) 35 Bom. 389).

38. Paternal uncle's son's son's son.

39. Paternal uncle's son's son's son's son.

40. Paternal uncle's son's son's son's son's son.

Widows of father's father and his 6 *descendants.*

41. Father's step-*mother.*

42. Paternal uncle's *widow.*

She takes before father's sister (*k*).

43. Paternal uncle's son's *widow.*

44. Paternal uncle's son's son's *widow.*

45. Paternal uncle's son's son's son's *widow.*

46. Paternal uncle's son's son's son's son's *widow.*

47. Paternal uncle's son's son's son's son's son's *widow.*

The 3*rd agnate female and the* 3*rd agnate male ancestor, and the latter's* 6 *descendants.*

48. Father's father's mother.

49. Father's father's father.

50. Father's paternal uncle.

51. Father's paternal uncle's son.

52. Father's paternal uncle's son's son.

53. Father's paternal uncle's son's son's son.

54. Father's paternal uncle's son's son's son's son.

55. Father's paternal uncle's son's son's son's son's son.

Widows of father's father's father and his 6 *descendants.*

56. Father's father's step-*mother.*

57. Father's paternal uncle's *widow.*

(*k*) *Raghunath Shankar* v. *Laxmibai* (1935) 59 Bom. 417, 157 I.C. 658, 37 Bom. L. R. 150 ('35) A.B. 298.

Ss. 72-74

58. Father's paternal uncle's son's *widow*.

59. Father's paternal uncle's son's son's *widow*.

60. Father's paternal uncle's son's son's son's *widow*.

61. Father's paternal uncle's son's son's son's son's *widow*.

62. Father's paternal uncle's son's son's son's son's son's *widow*.

The remaining sapindas and their widows.

63-70. The 4th agnate female and the 4th agnate male ancestor and the latter's 6 descendants, one after another (*l*).

71-77. Widows of gotraja sapindas nos. 64 to 70, one after another (*l*).

73. Order of succession among samanodakas.—Failing sapindas and their widows (sec. 72), the inheritance goes to Samanodakas according to the rules stated in sec. 45 above.

74. Order of succession among bandhus.—Failing samanodakas, the inheritance passes to bandhus according to the rules laid down in secs. 46 to 54 and 56 above. As regards the succession of bandhus, there is no difference between the Mitakshara and the Mayukha (*m*).

Father's sister—According to S. 56, the father's sister should be a bandhu, but according to the Mayukha, she is a gotraja sapinda; she comes in before bandhus, but after all the gotraja sapindas (*n*), for instance, a father's paternal uncle's son (*o*), a paternal uncle's widow (*p*). It is not clear whether, under the Mitakshara as interpreted in Bombay, she is a gotraja sapinda or a bandhu. But she is not more remote than a Bandhu (*q*).

In *Saguna* v. *Sadasiv* (*q*) it was held that the father's half-sister, though a female, being a bandhu *exparte paterna* is entitled to preference over the mother's brother, who though a male, is a bandhu *exparte materna*.

This leads us to the question as to what are the principles to be applied in a contest between a male bandhu and female bandhu. In *Balkrishna* v. *Ramkrishna* (*r*) it was

(*l*) *Ambaidas* v. *Jijibai* (1912) 14 Bom. L.R. 261, 14 I.C. 971.

(*m*) *Parol Bapulal* v. *Mehta Harilal* (1895) 19 Bom. 631.

(*n*) *Vijiarangam* v. *Lakshuman* (1871) 8 Bom. H.C.O.C. 244, 261, 263.

(*o*) *Ganesh* v. *Waghu* (1903) 27 Bom. 610.

(*p*) *Raghunath Shankar* v. *Laxmi Bai* (1935) 59 Bom. 417, 37 Bom. L.R. 150, 157 I.C. 658, ('35) A.B. 298.

(*q*) (1902) 26 Bom. 710.

(*r*) (1920) 45 Bom. 353, 59 I.C. 771, ('21) A.B. 189.

held that a mother's sister's son should be preferred to a brother's daughter. This decision is in direct conflict with the previous decision which was not cited either in the arguments or in the judgment. In *Kenchava* v. *Girimalappa* (s) the Privy Council left the question open and held that the father's sister's son (a male bandhu *exparte paterna*) is to be preferred to the father's brother's daughter (a female bandhu of the same degree). **Ss. 74-77**

In *Bai Vijli's* case (t), a mother's sister's son's son, who is an atma-bandhu was preferred to a father's father's sister's son's daughter who is a pitri-bandhu.

75. Strangers as heirs.—See secs. 57 and 58 above.

76. Escheat.—See sec. 59 above.

77. Order of succession in cases governed by the Mayukha.—The following is the order of succession to males in cases governed by the Mayukha (u) :—

1-6. Same as S. 72.

7. Father.

8. Mother—

See notes to sec. 72, no. 7, and notes to sec. 43, no. 7.

9. Full brothers along with sons of full brothers who are dead—

This rule does not go beyond brothers and brother's sons (v). Hence an uncle's son's son's son does not take equally with, but is postponed to, an uncle's son's son (w). As to the place of the half-brother, see no. 13 below. See Mayukha, ch. iv, sec. 8, v. 20.

10. Full brother's son—

With the brother's son end., "the compact series of heirs." In default of brother's sons, the inheritance passes to gotraja sapindas, the first amongst them being the paternal grandmother [no. 11]. See Mayukha, ch. iv, sec. 8, v. 18.

11-12. Same as S. 72.

13. Father's father and half-brother, in equal shares (x)—

This is obsolete (y). It is highly probable that the High Court of Bombay will in cases governed by the Mayukha adopt the same order of succession as that in cases governed by the Mitakshara, at least after no. 12. The order of succession after no. 12 will probably be (1) half-brother, (2) half-sister, (3) half-brother's son. The order of succession will thenceforth be the same as that in cases governed by the Mitakshara as interpreted in Bombay, that is, as in ss. 72-76. As to the father's sister, see s. 74.

(s) (1924) 51 I.A. 368, 376-377, 48 Bom. 569, 82 I. C. 966, ('24) A. PC. 209.

(t) *Bai Vijli* v. *Bai Prabhalakshmi* (1907) 9 Bom. L. R. 1129.

(u) Mayukha, ch. iv, s. 8.

(v) *Chandika Bakhsh* v. *Muna Kuar* (1902) 29 I.A. 70, 74, 24 All. 273, 280.

(w) *Haribhai* v. *Mathur* (1923) 47 Bom. 940, 77 I.C. 224, ('24) A.B. 140.

(x) *Vithalrao* v. *Ramrao* (1900) 24 Bom. 317, 338.

(y) *Sakharam* v. *Sitabai* (1879) 3 Bom. 353, at p. 363 ; *Kesserbai* v. *Valab* (1880) 4 Bom. 188, 207-208.

CHAPTER VII.

ORDER OF INHERITANCE TO MALES ACCORDING TO DAYABHAGA OR BENGAL SCHOOL.

Ss. 78, 79

78. Heritable property.—The property of a deceased Hindu governed by the Dayabhaga law passes by succession, including his share in undivided property (*z*).

The *Dayabhaga* of Jimuta Vahana is the leading treatise of the Bengal school. The present Chapter deals with the order of succession according to the Dayabhaga.

According to the Mitakshara law, the interest of a deceased coparcener passes on his death to other members of the coparcenary *by survivorship*. The Dayabhaga law does not recognize the right of survivorship as between coparceners.

79. Spiritual benefit the governing doctrine.—Succession according to the Bengal school is governed by the capacity for conferring spiritual benefit (*a*). Spiritual benefit, however, is not always the guiding principle of inheritance, and in cases not contemplated by the Dayabhaga, the doctrine of propinquity as propounded in the Mitakshara may be applied.

In *Akshay Chandra* v. *Hari Das* (*b*), Mitra, J., observed that in all cases of absence of texts or precedents under the Dayabhaga law, the Court should have regard to the theory of propinquity as adopted by Vijnaneswara. In that case the learned Judge said: "Spiritual benefit, notwithstanding some authorities to the contrary, is not always the guiding principle of inheritance under the Bengal school of law. The theory of spiritual benefit cannot apply to a good many cases of inheritance under the Dayabhaga school of law. Spiritual efficacy as a principle guiding rules of succession must fail in the cases of all female relations. . . In most cases, propinquity, spiritual efficacy and natural love and affection run in the same lines and no difficulty arises, but whenever they run in different lines, Jimutavahana was compelled to ignore spiritual efficacy and have recourse to other principles or express texts." In a later case (*c*) Mukerji, J., declined to follow this view, and observed that the scheme of the Dayabhaga was radically different from and to some extent incompatible with the scheme of the Mitakshara and the one could not be made to supplement the other so far as the law of inheritance was concerned, and that although the Dayabhaga might be silent so far as express enumeration went, it was not silent so far as the indication of the general principle according to which heirship was determined was concerned. In a recent case (*d*), however, the Court preferred the view taken by Mitra, J.

Vaishnavas (worshippers of Vishnu) do not observe *shradha* and offer no oblations to their ancestors. But this does not exclude them from inheritance, for the right to inherit is based on the *capacity* to offer *pindas*, and not on the actual offering of it (*d*).

(*z*) *Durga Nath* v. *Chintamoni* (1904) 31 Cal. 214.

(*a*) *Guru Gobind* v. *Anand Lal* (1870) 5 Beng. L. R. 15 [F. B.]; *Tagore* v. *Tagore* (1872) 9 Beng. L. R. 377, 394 I. A. Sup. Vol. 47, 64; *Digumber* v. *Moti Lall* (1883) 9 Cal. 563 [F. B.].

(*b*) (1908) 35 Cal. 721, 726; *Toolsee Dass* *Luckhymoney* (1900) 4 C. W. N. 743.

(*c*) *Sambhu Chandra* v. *Kartick Chandra* (1927) 54 Cal. 171, 174, 97 I. C. 845, ('27) A. C. 11.

(*d*) *Nalinaksha* v. *Rajani* (1931) 58 Cal. 1392, 134 I.C. 1272, ('31) A.C. 741.

It may be observed that in most cases spiritual efficacy and propinquity run on the same lines. The result is that the same persons who are heirs under the Dayabhaga law are also heirs under the Mitakshara law. But all persons who are heirs under the Mitakshara law are not heirs under the Dayabhaga law. The Dayabhaga excludes many cognates recognized as heirs by the Mitakshara. Cognates are persons related to the deceased through a female. **Ss. 79, 80**

80. Doctrine of spiritual benefit.—The foundation of the doctrine of spiritual benefit is the *Parvana Sradha* ceremony. In the course of the ceremony the performer presents three different kinds of offerings to his deceased ancestors, namely—

(1) *pinda* or an entire cake, called an undivided oblation ;

(2) *pinda-lepas* or remnants of the *pinda* which cling to the hand while mixing the ingredients of which the *pindas* are composed, called a divided oblation ; and

(3) libations of water.

The *pinda* is offered to the three immediate paternal ancestors, that is, the father, grandfather and great-grandfather, and the three immediate maternal ancestors, that is, the maternal grandfather, the maternal great-grandfather and the maternal great-great-grandfather.

The *pinda-lepas* are offered to the three paternal ancestors next above those to whom the *pinda* is offered.

The libations of water are offered to the seven paternal ancestors next above those to whom *pinda-lepas* are offered.

He who offers a *pinda* and he to whom a *pinda* is offered are the sapindas of each other.

He who offers *pinda-lepas* and he to whom they are offered are the sakulyas of each other.

He who offers libations of water and he to whom they are offered are the samanodakas of each other.

But this does not exhaust the list of sapindas, sakulyas and samanodakas. For a deceased Hindu does not merely benefit by oblations which are offered to himself: he also *participates* in the benefit of oblations offered to the *paternal ancestors* to whom he himself was bound to offer them while he was alive (*e*). The result is that persons connected by oblations presented to common ancestors become the sapindas,

(*e*) *Guru Gobind* v. *Anand Lal* (1870) 5 Beng. L.R. 15, 37 [F.B.].

Ss. 80-82

sakulyas and samanodakas of one another, according to the nature of the oblation presented to them. This accounts for a large number of other relations who are recognized as sapindas, sakulyas and samanodakas.

Pindas are of three kinds in the following order of superiority (*f*) :—

1. Those given *directly* to the deceased himself.
2. Those given to his three paternal ancestors *in which he participates.*
3. Those which he was bound to give to his three maternal ancestors, but *in which he does not participate.*

In each of these three descriptions of *pindas*, those presented by agnate descendants of a common ancestor are preferred to those presented by cognate descendants of such ancestor.

"Although the deceased has no right of participation in the oblations presented to his *maternal* ancestors, still, inasmuch as the three immediate maternal ancestors received oblations from him, and the agnate and cognate descendants of each offered *pindas* which the deceased was bound to give, there is thus created a heritable bond between him and his maternal kinsmen" (*g*).

81. Three classes of heirs.—The three kinds of offerings referred to in the preceding section give rise to three classes of heirs, according to the Dayabhaga law, namely, (1) sapindas, (2) sakulyas, and (3) samanodakas.

The sapindas succeed before the sakulyas, and the sakulyas succeed before the samanodakas (*h*).

The reason for this preference is that *pindas* (undivided oblations) are considered to be of higher spiritual value than *pinda-lepas* (divided oblations) and *pinda-lepas* are considered to be of higher spiritual value than oblations of water.

82. Sapindas.—A Hindu governed by the Dayabhaga law is the sapinda—

(1) of those to whom he is bound to offer a *pinda* while he is alive ;

In this group are included his three immediate paternal ancestors, being his father, grandfather, great-grandfather, and his three immediate maternal ancestors, being his maternal grandfather, maternal great-grandfather, and maternal great-great-grandfather—altogether 6 relations.

(2) of those who, on his death, are bound to offer a *pinda* to him ;

In this group are included those persons to whom he stands in the relation of father, grandfather, and great-grandfather, namely, his son, grandson and great-grandson, and those persons to whom he stands in the relation of maternal grandfather, maternal great-grandfather, and maternal great-great-grandfather, namely, his daughter's son, son's daughter's son and grandson's daughter's son—altogether 6 relations.

(*f*) Sarvadhikari, 2nd ed., pp. 701, 705.

(*g*) Sarvadhikari, 2nd ed., p. 704.

(*h*) *Guru Gobind* v. *Anand Lal* (1870) 5 Beng. L. R. 15, 38 [F.B.]; *Digamber Roy* v. *Moti Lall* (1883) 9 Cal. 563 [F.B.].

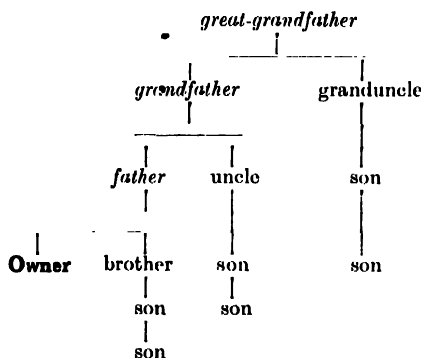
(3) of those who are bound to offer a *pinda* to the ancestors to whom he is bound to offer a *pinda*, those ancestors being his three immediate paternal ancestors and his three immediate maternal ancestors; S. 82

and all of them are his sapindas (*i*).

The 3rd set of sapindas may be divided into four groups as follows :—

Firstly, the brother, brother's son, brother's son's son; paternal uncle, paternal uncle's son, paternal uncle's grandson; paternal granduncle, paternal granduncle's son, and paternal granduncle's grandson—altogether 9 relations.

The brother is bound to offer 3 *pindas*, one to each of the three paternal ancestors of the deceased, they being also his paternal ancestors. The brother's son is bound to offer 2 *pindas*, one to his grandfather, that is, the owner's father, and the other to his great-grandfather, that is, the owner's grandfather. The uncle and uncle's son are bound each to offer 2 *pindas*, one to each of the two paternal ancestors of the deceased, namely, his grandfather and great-grandfather, who are also their grandfather and great-grandfather. The remaining five relations are bound each to offer 1 *pinda*, the brother's son's son to the owner's father, the uncle's son's son to the owner's grandfather, and the granduncle, his son and grandson each 1 *pinda* to the owner's great-grandfather. This is a case where some or all of the three *paternal* ancestors of the deceased are also the *paternal* ancestors of the 9 relations mentioned above as will be seen from the following diagram :—



Secondly, sister's son, father's sister's son, grandfather's sister's son; brother's daughter's son, brother's son's daughter's son; paternal uncle's daughter's son, paternal granduncle's daughter's son; paternal uncle's son's daughter's son, paternal granduncle's son's daughter's son—altogether 9 relations.

Note.—The sister's son offers 3 *pindas*, one to each of the three paternal ancestors of the deceased, they being his own *maternal* ancestors. The father's sister's son and the paternal uncle's daughter's son offer each 2 *pindas*, one to each of the two paternal ancestors of the deceased, namely, his grandfather and great-grandfather, they being their *maternal* ancestors. The brother's daughter's son offers 2 *pindas*, one to the father and the other to the grandfather of the deceased, they being his *maternal* ancestors, The remaining five relations each offer 1 *pinda* to one or other of the three paternal ancestors of the deceased that ancestor being their *maternal* ancestor. This is a case where some or all of the *paternal* ancestors of the deceased are the *maternal* ancestors of the 9 relations mentioned above. These are bandhus *ex paterna* of the Mitakshara school.

(*i*) *Guru Gobind* v. *Anand Lal* (1870) 5 Beng. L. R. 15, 39 [F.B.].

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Thirdly, maternal uncle, maternal uncle's son, maternal uncle's grandson; maternal granduncle, maternal granduncle's son, maternal granduncle's grandson; maternal great-granduncle, maternal great-granduncle's son, maternal great-granduncle's grandson—altogether 9 relations.

Note.– The maternal uncle offers 3 *pindas*, one to each of the three *maternal* ancestors of the deceased, they being his own *paternal* ancestors. The maternal uncle's son, the maternal granduncle, and the maternal granduncle's son, each offer 2 *pindas* to two out of the three maternal ancestors of the deceased, these ancestors being their paternal ancestors. The remaining five relations each offer one *pinda* to one or other of the three *maternal* ancestors of the deceased, that ancestor being their *paternal* ancestor. This is a case where some or all of the *maternal* ancestors of the deceased are the *paternal* ancestors of the 9 relations mentioned above. These are bandhus *ex parte materna* of the Mitakshara school.

Fourthly, maternal aunt's son, maternal grandaunt's son and maternal great-grandaunt's son; maternal uncle's daughter's son; maternal uncle's son's daughter's son; maternal granduncle's daughter's son, maternal granduncle's son's daughter's son; maternal great-granduncle's daughter's son, maternal great-granduncle's son's daughter's son—altogether 9 relations.

Note.- The maternal aunt's son offers 3 *pindas*, one to each of the three *maternal* ancestors of the deceased, they being also his maternal ancestors. The maternal grand-aunt's son, the maternal uncle's daughter's son, and the maternal granduncle's daughter's son each offer 2 *pindas* to two out of the three maternal ancestors of the deceased, these ancestors being also their maternal ancestors. The remaining five relations each offer one *pinda* to one or other of the three maternal ancestors of the deceased, that ancestor being also their maternal ancestor. This is a case where some or all of the three *maternal* ancestors of the deceased are also the *maternal* ancestors of the 9 relations mentioned above. These relations also are bandhus *ex parte materna* of the Mitakshara school.

It will thus be seen that there are in all 48 male sapindas. To these are to be added the 5 female sapindas mentioned in the next section. The total number of sapindas is thus 53.

Since sapindas succeed before sakulyas, and since the sapindas enumerated above comprise also several relations called bandhus in the Mitakshara, it is clear that bandhus also succeed before sakulyas. According to the Mitakshara law, bandhus do not succeed until after samanodakas. This is the main point of distinction between succession according to the Dayabhaga law and succession according to the Mitakshara law. In other respects it will be found that the order of succession according to the Dayabhaga law, though arrived at by the application of rules based upon the doctrine of spiritual benefit, is more or less the same as in the Mitakshara law. See sec. 95.

83. Female sapindas.—There are five female sapindas according to the Dayabhaga law, namely the widow, the daughter, the mother, the father's mother and the father's father's mother. No other female is recognized as an heir by the Bengal school.

There are no female heirs in the class either of sakulyas or samanodakas.

The wife is the sapinda of her husband, for in the absence of male issue, she performs the funeral obsequies. The mother, the father's mother, and father's father's mother are sapindas, for they share in the *pindas* or cakes offered to their respective husbands. The daughter is a sapinda, for though she herself does not offer any *pinda*, her son does so. See sec. 61 above.

84. Sakulyas.—A Hindu governed by the Dayabhaga law is the sakulya (1) of those to whom he is bound to offer *pinda-lepa* while he is alive, (2) of those who on his death are bound to offer *pinda-lepa* to him, and (3) of those who are bound to offer *pinda-lepa* to those to whom he offers the *pinda-lepa*, Ss. 84, 85

and all of them are his sakulyas.

The sakulyas are all males. They are—

First, the 4th, 5th and 6th paternal male ancestors of the owner, being F^4, F^5 and F^6, in the Table at p. 34;

Secondly, his 4th, 5th and 6th male descendants in the male line, that is, S^4, S^5 and S^6, in the said Table; and

Thirdly, the six male descendants in the male line of the 4th, 5th and 6th paternal male ancestors, and the 4th, 5th and 6th male descendants in the male line of his father, grandfather, and great-grandfather, that is, x^1 to x^3 in the line of F^4, F^5 and F^6 and x^4 to x^6 in the lines of F^7 to F^3, in all 27 relations.

The total number of sakulyas is thus $3+3+27=33$.

The Mitakshara does not recognize sakulyas as a distinct class; they are merged in the group of gotraja sapindas.

The sakulyas are all agnates, that is, persons connected with the deceased by an unbroken line of male descent. None of them is a cognate, that is, a person related to the deceased through a female. But the sapindas of the Bengal school, as we have seen, are some of them agnates and some of them cognates. The samanodakas also, as we shall presently see, are all agnates.

According to Dr. Sarvadhikari (*j*), the following 9 *cognate* relations are also sakulyas, namely—

1—3. The daughter's son of F^4, his son, and his son's son.

4—6. The daughter's son of F^5, his son, and his son's son.

7—9. The daughter's son of F^6, his son, and son's son.

85. Samanodakas.—A Hindu governed by the Dayabhaga law is the samanodaka (1) of those to whom he is bound to offer libations of water, (2) of those who on his death are bound to offer libations of water to him, and (3) of those who are bound to offer libations of water to those to whom he offers the libations,

and all of them are his samanodakas.

The samanodakas like sakulyas are all males. They include all agnatic relations from the 8th to the 14th degree, and are 147 in number. See notes to sec. 40, "Samanodakas."

(*j*) 2nd ed., p. 718.

Ss. 86-88

86. Principles governing precedence among sapindas.—The order of succession among sapindas is governed by the following principles :—

(1) Those who offer a *pinda* to the deceased are preferred to those who accept it from the deceased.

Thus the son, grandson and great-grandson offer oblations to the deceased, and the father, grandfather and great-grandfather receive oblations from the deceased; therefore, the son, grandson, and great-grandson succeed before the father, grandfather, etc. The son, grandson and great-grandson all inherit as *one* heir, for the oblations offered by them are of *equal* spiritual value.

(2) Those who offer oblations to both paternal and maternal ancestors are preferred to those who offer oblations only to the paternal ancestors.

Therefore relations of the whole blood are preferred to those of the half-blood. A full-brother offers oblations both to the paternal and maternal ancestors of the deceased, they being his own paternal and maternal ancestors. But a half-brother offers oblations only to the paternal ancestors of the deceased, and not to the maternal ancestors of the deceased, his mother and the deceased's mother being different persons.

(3) Those who offer a *pinda* to the paternal ancestors of the deceased are preferred to those who offer it to his maternal ancestors.

(4) Those who offer a larger number of cakes of a particular description are preferred to those who offer a less number of cakes of the same description; and where the number of such cakes is equal, those who offer them to nearer ancestors are preferred to those who offer them to more distant ancestors (*k*).

Note that a person who offers one oblation to the father of the deceased owner is preferred to another who offers two oblations to the grandfather and great-grandfather. Hence the grandnephew ranks before the paternal uncle (*l*).

87. Principles governing precedence among sakulyas and samanodakas.—The order of succession among sakulyas and samanodakas is governed by principles similar to those which apply to sapindas (*m*).

88. Order of succession among sapindas.—The sapindas of the Bengal school are divided into two classes, namely, (1) sapindas *ex parte paterna*, and sapindas *ex parte*

(*k*) *Guru Gobind* v. *Anand Lal* (1870) 5 Beng. L. R. 15 [F.B.]; *Gobind* v. *Mohesh* (1874) 15 Beng. L. R. 35; *Pran Nath* v. *Surrut Chandra* (1882) 8 Cal. 460; *Huri Das* v. *Bama Churn* (1888) 15 Cal. 780; *Braja Lal* v. *Jiban* (1890) 26 Cal. 285.

(*l*) (1882) 8 Cal. 460, *supra*.

(*m*) (1870) 5 Beng. L. R. 15, 39 [F.B.], *supra*.

materna. Nos. 1 to 32, except the five females, namely, Nos. 4, 5, 8, 14 and 20, are sapindas *ex parte paterna*. Nos. 33 to 53 are sapindas *ex parte materna*. Sapindas *ex parte materna* do not succeed until after sapindas *ex parte paterna*. The five females Nos. 4, 5, 8, 14 and 20 succeed by virtue of special texts. S. 88

The sapindas succeed in the following order :—

1-3 Son, grandson and great-grandson.

They succeed in the same manner as under the Mitakshara ; see sec. 43, nos. 1-3, on p. 35 above.

4. Widow (*n*).

See notes to sec. 43, " Widow."

5. Daughter.

Priority amongst daughters.—The unmarried daughter succeeds first ; then the married daughter who has or is likely to have male issue. Daughters who are barren or are widows without male issue, or are mothers of daughters only, are excluded from inheritance (*o*), though their re-marriage is permitted in the caste to which they belong and though they may be of child-bearing age (*p*). Thus it has been held that a married daughter having a son (*q*), and even a daughter's son (*r*) exclude a childless widowed daughter. But, where, during the life time of the father the son-in-law was willing and competent to adopt and has actually adopted after the father's death, the daughter is entitled to inherit (*s*).

Unchastity.—An unchaste daughter in Bengal is not entitled to inherit to her father. But once the estate has vested in her, it cannot be devested by subsequent unchastity (*t*).

As to other matters, see notes to sec. 43, " Daughter."

6. Daughter's son.

The *daughter's son's son* is not an heir under the Dayabhaga school of Hindu law (*u*). The reason given in the Dayabhaga is that he is not the giver of a funeral oblation ; the oblation ceases with the daughter's son : Dayabhaga, XI, 2, 2. See notes to sec. 43, " Daughter's son."

7. Father.

8. Mother.

An unchaste mother in Bengal is not entitled to inherit to her son. But once the estate has vested in her, it cannot be devested by subsequent unchastity (*v*).

(*n*) *Durga Nath* v. *Chintamoni* (1904) 31 Cal. 214.

(*o*) *Bendde* v. *Purdhan* (1865) 2 W. R. C. R. 176 ; *Radha* v. *Rajah Ram* (1866) 6 W. R. 147.

(*p*) *Binodini* v. *Susthee* (1921) 48 Cal. 300, 57 I. C. 740, ('21) A.C. 295 ; *Srimati Pramila* v. *Chandra Shekhar* (1921) 43 All. 450, 60 I. C. 777, ('21) A. A. 122.

(*q*) 48 Cal. 300, 57 I. C. 740, ('21) A. C. 295, *supra*.

(*r*) 43 All. 450, 60 I. C. 777, ('21) A. A. 122, *supra*.

(*s*) *Uma Kanta Bhattacharjya* v. *Red Bati Debi* (1942) Cal. 299, ('42) A.C. 265.

(*t*) *Ramananda* v. *Raikishori* (1895) 22 Cal. 347 ; *Sundari* v. *Pitambari* (1905) 32 Cal. 871.

(*u*) *Nepaldas* v. *Prothas Chandra* (1925) 30 C. W. N. 357, 90 I. C. 499, ('26) A. C. 460.

(*v*) *Ramnath* v. *Durga* (1879) 4 Cal. 550.

S. 88

9. Brother .. .. { (i) of the whole blood. (ii) of the half-blood. }
10. Brother's son .. { (i) of the whole blood. (ii) of the half-blood. }
11. Brother's son's son .. { (i) of the whole blood. (ii) of the half-blood. }
12. Sister's son.
13. Paternal grandfather.
14. Paternal grandmother.
15. Paternal uncle.
16. Paternal uncle's son.
17. Paternal uncle's son's son.
18. Father's sister's son.
19. Paternal great-grandfather.
20. Paternal great-grandmother.
21. Paternal granduncle.
22. Paternal granduncle's son.
23. Paternal granduncle's son's son.
24. Father's father's sister's son.

Then come, consistently with the opinion expressed in the undermentioned cases (*w*) the following 8 cognate relations, namely,—

25. Son's daughter's son.
26. Son's son's daughter's son.
27. Brother's daughter's son (*x*).
28. Brother's son's daughter's son (*y*).
29. Paternal uncle's daughter's son (*z*).
30. Paternal uncle's son's daughter's son.
31. Paternal granduncle's daughter's son.
32. Paternal granduncle's son's daughter's son.

Dr. Sarvadhikari (*a*) places Nos. 25 and 26 immediately after No. 6, Nos. 27 and 28 immediately after No. 12, Nos. 29 and 30 immediately after No. 18, and Nos. 31 and 32 immediately after No. 24.

Next come the maternal relations of the deceased.

(*w*) *Gobind Proshad* v. *Mohesh Chunder* (1875) 15 Beng. L. R. 35. See also *Hari Das* v. *Bama Churn* (1888) 15 Cal. 780, 793-794; *Pran Nath* v. *Surrut Chundra* (1882) 8 Cal. 460, 463-464.

(*x*) *Digumber* v. *Moti Lall* (1883) 9 Cal. 563 [F.B.].

(*y*) (1882) 8 Cal. 460, *supra*.

(*z*) *Guru Gobind* v. *Anand Lal* (1870) 5 Beng. L. R. 15 [F.B.]; *Braja Lal* v. *Jiban* (1899) 26 Cal. 285.

(*a*) 2nd Ed., page 709.

33. Maternal grandfather.
34. Maternal uncle (*b*).
35. Maternal uncle's son (*c*).
36. Maternal uncle's son's son.
37. Mother's sister's son.

38. Maternal great-grandfather, (39) his son, (40) his grandson, (41) his great-grandson, and (42) his daughter's son.

43. Maternal great-great-grandfather, (44) his son, (45) his grandson, (46) his great-grandson, and (47) his daughter's son.

The maternal great-great-grandfather's *daughter's son's son* is not an heir under the Dayabhaga law (*d*). He is an heir under the Mitakshara law : see sec. 54, no. 94.

48-49. Son's daughter's son and son's son's daughter's son of the maternal grandfather; (50-51) son's daughter's son and son's son's daughter's son of the maternal great-grandfather; and (52-53) son's daughter's son and son's son's daughter's son of the maternal great-great-grandfather.

Dr. Sarvadhikari (*e*) places Nos. 48 and 49 immediately after No. 37, Nos. 50 and 51 immediately after No. 42, and Nos. 52 and 53 immediately after No. 47.

Note that Nos. 12, 18, 24, 25 to 32, and 33 to 53 are bandhus according to the Mitakshara school, and they do not succeed until after the samanodakas of that school.

89. Order of succession among Sakulyas.—Failing all sapindas the inheritance according to the Dayabhaga system passes to sakulyas, according to the order to be deduced from the rules laid down in section 86 above.

90. Order of succession among Samanodakas.—Failing all sapindas and sakulyas the inheritance passes to samanodakas, according to the order to be deduced from the rules in section 86 above.

91. Preceptor, disciple and fellow-student.—On failure of all the heirs of the deceased his preceptor, pupil and fellow-student are in their order entitled to take the estate. If there be none of these the inheritance passes, according to the Dayabhaga, to persons bearing the same *gotra* or family name.

(*b*) *Pudma Coomari* v. *Court of Wards* (1882) 8 Cal. 302, 8 I. A. 229.

(*c*) *Rani Srimuty Dibeah* v. *Koond Luta* (1817) 4 M. I. A. 292.

(*d*) *Sambhu Chandra* v. *Kartick Chandra* (1927) 54 Cal. 171, 97 I. C. 845, ('27) A. C. 11

(*e*) 2nd Ed., p. 710.

Ss. 91-94

See sec. 85 and notes thereto.

See sec. 57 and notes thereto. As to succession to hermits and members of a religious order, see sec. 58 above and Dayabhaga, ch. 11, sec. 6, paras. 35-36.

92. Escheat.—On failure of all these heirs, the Crown takes by escheat (*f*).

See sec. 59.

93. Female heirs: Bengal school.—The only females recognised as heirs in the Bengal school are the (1) widow, (2) daughter, (3) mother, (4) father's mother, and (5) father's father's mother (*g*).

Succession after Reunion.

94. Order of succession among reunited members.—It would seem that according to the Dayabhaga the order of succession to the estate of a reunited member is the same as that to the estate of an undivided member, with this exception that as between claimants of equal degree one who is reunited is to be preferred to one who is not reunited, so that a reunited brother would be preferred to a brother who was not reunited, and a reunited uncle would be preferred to an uncle who was not reunited. The preference arising from reunion is not confined to the reunited members themselves, but extends also to their descendants, so that even the *son* of a reunited brother would be preferred to the *son* of a separated brother (*h*).

The only persons who can reunite according to the Bengal school are, (1) the father and son; (2) brothers; (3) uncle and nephew.

(*f*) *Collector of Masulipatam* v. *Cavaly Vencata* (1860) 8 M.I.A. 500.

(*g*) *Guru Gobind* v. *Anand Lal* (1870) 5 Beng. L. R. 15, 36 37 [F.B.].

(*h*) *Akshay* v. *Hari* (1908) 35 Cal 721; *Abha Churn* v. *Mangal Jana* (1892) 19 Cal. 634.

CHAPTER VIII.

POINTS OF DIFFERENCE BETWEEN MITAKSHARA AND DAYABHAGA SUCCESSION.

95. Points of distinction between the Mitakshara and the Dayabhaga system of inheritance.—The following are the main points of distinction between the Mitakshara and the Dayabhaga system of inheritance :— S. 95

(1) The Bengal school divides heirs into three classes, namely, (1) sapindas, (2) sakulyas, and (3) samanodakas. The sapindas of the Bengal school are the sapindas of the Mitakshara school within 4 degrees only *plus* bandhus of the Mitakshara school, but not all the bandhus. The sakulyas of the Bengal school are the sapindas of the Mitakshara school from the 5th to the 7th degree. The samanodakas of the Bengal school are the same as those of the Mitakshara school, that is, agnatic relations from the 8th to the 14th degree.

(2) Generally speaking, under the Mitakshara law, no bandhu or cognate can inherit while there is any gotraja sapinda or samanodaka in existence. Under the Dayabhaga Law, cognates come in with the agnates, and they inherit before sakulyas and samanodakas.

(3) Cognatic heirs under the Dayabhaga law are limited in number compared with those under the Mitakshara law. Every person who is a cognatic heir under the Dayabhaga law is also a cognatic heir under the Mitakshara law, but there are some relations who are cognatic heirs under the Mitakshara law, but are not recognized as such under the Dayabhaga law. The doctrine of spiritual efficacy, which is the governing principle of succession under the Dayabhaga law, accounts for the exclusion of the latter.

(4) "Sapinda" according to the Mitakshara, means a person connected through the same *pinda* or body; according to the Dayabhaga, it means a person connected through the same *pinda* or funeral cake presented to the manes of ancestors at the *Parvana Sraddha* ceremony. See sec. 80 above.

CHAPTER IX.

EXCLUSION FROM INHERITANCE AND PARTITION.

"An impotent person and an outcast are excluded from a share of the heritage and so are those deaf and dumb from birth, as well as mad men, idiots, and the dumb and any other that is devoid of an organ of sense or action."—*Manu, ix.*, 201.

S. 96 **96. Unchastity.**—(*1*) A widow who is unchaste at the time of her husband's death is not entitled to inherit to him, but once the husband's estate has vested in her—which could only be if she was chaste at the time of her husband's death—it cannot be divested by her subsequent unchastity (*i*). Similarly where the widow of a joint owner is given a widow's estate on her husband's death under a family arrangement, such an estate is not divested by her subsequent unchastity in the absence of any provision to that effect (*j*).

(*2*) There is a difference of opinion between the Mitakshara and Dayabhaga schools as to whether the unchastity of any other female heir excludes her from inheritance.

According to the Mitakshara law, the only female liable to exclusion from inheritance by reason of unchastity is the widow (*k*).

See sec. 43, "Widow," note No. 2.

According to the Dayabhaga law, the condition of chastity applies not only to the widow, but also to other female heirs, such as daughter and mother, to the same extent as it does to a widow (*l*). [Sec. 88, notes to nos. 5 and 8.]

(*3*) Unchastity excludes a female from inheriting to a male, but not to a female. It is, therefore, not a bar to inheriting stridhana, even according to the Dayabhaga law (*m*).

(*i*) *Moniram* v. *Keri Kolitani* (1880) 5 Cal. 776, 7 I.A. 115; *Sellam* v. *Chinnammal* (1901) 24 Mad. 441; *Gangadhar* v. *Yellu* (1912) 36 Bom. 138, 12 I.C. 714.

(*j*) *Lakshmichand* v. *Mst. Anandi* (1935) 62 I. C. 250, 57 All. 672, 37 Bom. L. R. 849, 157 I. C. 869, ('35) A. PC. 180.

(*k*) *Advyapa* v. *Rudrava* (1880) 4 Bom. 104; *Tara* v. *Krishna* (1907) 31 Bom. 495, 510; *Kojiyadu* v. *Lakshmi* (1882) 5 Mad. 149; *Vedammal* v. *Vedanayaga* (1908) 31 Mad. 100; *Dal Singh* v. *Dini* (1910) 32 All. 155, 5 I.C. 520; *Baldeo* v. *Mathura* (1911) 33 All. 702, 11 I.C. 43 [mother]; *Ram Pergash* v. *Mussammat Dahan Bibi* (1924) 3 Pat. 152, 78 I.C. 749, ('24) A.P. 420 [daughter].

(*l*) *Ramananda* v. *Raikishori* (1895) 22 Cal. 347 [daughter]; *Sundari* v. *Pitambari* (1905) 32 Cal. 871 [daughter]; *Ramnath* v. *Durga* (1879) 4 Cal. 550 [mother].

(*m*) *Nogendra* v. *Benoy* (1903) 30 Cal. 521; *Angammal* v. *Venkata* (1903) 26 Mad. 509.

Ss. 97, 98

97. Change of religion and loss of caste.—(*1*) Change of religion and loss of caste which at one time were grounds of forfeiture of property and of exclusion from inheritance have ceased to be so since the passing of the Caste Disabilities Removal Act, 1850 (*n*).

(*2*) The Act applies only to protect the actual person who either renounces his religion, or has been excluded from the communion of any religion, or has been deprived of caste. Consequently, where the property of a Mahomedan converted from Hinduism has passed according to Mahomedan law to his descendants, Hindu collaterals cannot claim by virtue of the Act to succeed under Hindu law (*o*).

Once a person has changed his religion and his personal law, that law will govern the rights of succession of his children (*p*).

Illustrations.

(a) *A* and his son *B* are members of a joint Hindu family. *A* becomes a convert to Mahomedanism. *A* does not by his conversion forfeit his interest in the joint family property. The only effect of the conversion is that it operates as a separation of the family, and one-half of the property vests immediately in *A*, and the other half in *B*: *Khunni Lal* v. *Govind* (1911) 33 All. 356, 38 I.A. 87, 10 I.C. 477; *Gobind* v. *Abdul* (1903) 25 All. 546, 573.

(b) A married Hindu becomes a convert to Mahomedanism, and marries a Mahomedan wife and has children by her. The persons entitled to his estate on his death are his Mahomedan wife and children, and not his Hindu wife: *Chedambaram* v. *Ma Nyein Me* (1928) 6 Rang. 243, 111 I.C. 2, ('28) A.R. 179.

(c) *A* and *B* are two Hindu brothers separate in estate. *B* becomes a convert to Mahomedanism. After *B*'s conversion a son *C* is born to him who also is a Mahomedan. *B* dies leaving *C*. Afterwards *A* dies leaving a widow. On *A*'s death his widow succeeds to his property. After the widow's death, *C* claims *A*'s property as his nephew. *C* is not entitled to succeed to the property.

It may here be noted that the provisions of Bengal Regulations VII of 1832 were to the same effect as those of Act XXI of 1850.

98. Physical and mental defects: Disqualified heirs.—(*1*) Under the texts as interpreted by the Courts the following

(*n*) *Khunni Lal* v. *Gobind* (1911) 33 All. 356, 38 I.A. 87, 10 I.C. 477, reversing s. c. in 29 All. 487; (1924) 3 Pat. 152, 78 I.C. 749, ('24) A.P. 420, *supra*. See also *Subbaraya* v. *Ramasami* (1900) 23 Mad. 171.

(*o*) *Mitar Sen Singh* v. *Maqbul Hasan Khan* (1930) 57 I.A. 313, 52 Cal. L.J. 551, 128 I.C. 268, ('30) A. PC. 251: affirming (1928) 3 Luck. 154, 107 I.C. 890, ('28) A. O. 138, and disapproving *Bhagwant Singh* v. *Kallu* (1889) 11 All. 100; *Vaithilinga* v. *Ayyathorai* (1917) 40 Mad. 1118, 37 I. C. 753, ('18) A. M. 430 [Conversion to Christianity]; *Chedambaram* v. *Ma Nyein Me* (1928) 6 Rang. 243, 111 I.C. 2, ('28) A.R. 179; *Rupa* v. *Sardar Mirza* (1920) 1 Lah. 376, 55 I.C. 410, ('20) A.L. 276, is no longer good law.

(*p*) (1930) 57 I.A. 313, 52 Cal. L.J. 551, 128 I.C. 26, ('30) A. PC. 251, *supra*.

S. 98 defects, deformities and diseases exclude an heir from inheritance :—

(a) *Blindness* (*q*), *deafness, and dumbness* (*r*), provided the defect is both congenital and incurable.

(b) *Want of any limb or organ,* if congenital. This includes the case of a person who is lame (*s*) or has no nose or tongue. It also includes the case of congenital impotence.

(c) *Lunacy.* This need not be congenital or incurable to exclude the heir from inheritance. It is enough if it exists at the time when the succession opens (*t*).

(d) *Idiocy,* provided it is complete and absolute (*u*). Idiocy is, of course, congenital.

(e) *Leprosy,* when it is of such a virulent type that it is incurable and renders him unfit for social intercourse. It need not be congenital (*v*).

(f) *Other incurable diseases* (*w*).

(*2*) Under the Hindu Inheritance (Removal of Disabilities) Act, 1928, no person, other than a person *who is and has been from birth a lunatic or idiot,* is excluded from inheritance or from any right or share in joint family property by reason only of any disease, deformity, or physical or mental defect. The Act came into force on the 20th September, 1928. It is not retrospective.

The Act does not apply to any person governed by the Dayabhaga School of Hindu Law.

(*q*) *Mohesh Chunder* v. *Chunder Mohun* (1875) 14 Beng. L. R. 273 [Dayabhaga case]; *Murarji* v. *Parratibai* (1876) 1 Bom. 177 *Umabai* v. *Bharu* (1876) 1 Bom. 557 *Guneshwar* v. *Durga Prasad* (1917) 44 I.A 229, 45 Cal. 17, 24, 42 I.C. 849, ('17) A.PC 146; *Pudiara* v. *Paranasa* (1922) 45 Mad. 949, 69 I.C. 313, ('23) A. M. 215 [F.B.].

(*r*) *Vallabhram* v. *Bai Hariganga* (1867) 4 Bom. H. C. A. C. 135: *Savitri Bai* v. *Bhabat* (1927) 51 Bom. 50, 100 I.C. 586, ('27) A.B. 103. See also *Bharmappa* v. *Ujjanganda* (1922) 46 Bom. 455. 65 I.C. 216, ('22) A.B. 173; *Anukul Chadra* v. *Surendra* (1939) 1 Cal. 592.

(*s*) *Venkata* v. *Purushottam* (1903) 26 Mad. 133.

(*t*) *Baboo Bodhanarain* v. *Omrao* (1870) 13 M.I.A. 519; *Koer Goolab Singh* v. *Kurun Singh* (1871) 14 M.I.A. 176: *Deo Kishen* v. *Budh Prakash* (1883) 5 All. 509 [F.B.]; *Wooma Pershad* v. *Grish Chander* (1884) 10 Cal. 639; *Ram Singh* v. *Bhani* (1916) 38 All. 117, 32 I.C. 127, ('16) A.A. 47; *Muthusami* v. *Meenammal* (1920) 43 Mad. 464, 55 I.C. 576, ('20) A.M. 652: *Bapuji* v. *Dattu* (1923) 47 Bom. 707, 73 I.C. 279, ('23) A.B. 425.

(*u*) *Tirumamagal* v. *Ramasvami* (1863) 1 Mad. H.C. 214; *Surti* v. *Narain Das* (1890) 12 All 530; *Ran Bijai* v. *Jagat Pal* (1891) 18 Cal. 111 [P.C.].

(*v*) *Ramabai* v. *Harnabai* (1924) 51 I.A. 177, 48 Bom. 363, 80 I.C. 193, ('24) A.PC. 125; *Ananta* v. *Ramabai* (1876) 1 Bom. 554; *Rangayya* v. *Thanikachalla* (1896) 19 Mad. 74; *Kayarohana* v. *Subbaraya* (1915) 38 Mad. 250, 19 I.C. 690, ('16) A.M. 470; *Karali* v. *Ashutosh* (1923) 50 Cal. 604, 75 I.C. 474, ('23) A.C. 331. See also *Man Singh* v. *Gaini* (1918) 40 All. 77, 43 I.C. 62, ('18) A.A. 377.

(*w*) See (1915) 38 Mad. 250, 19 I.C. 690, ('16) A. M. 470, *supra.*

The Act is set out in Appendix V below. Under the Act the only defects which disqualify an heir from inheritance or from a share on partition are congenital lunacy and congenital idiocy.

99. Murder.—A murderer, even if not disqualified under Hindu law from succeeding to the estate of the person murdered is so disqualified upon the principles of justice, equity and good conscience. Further, no title to the estate of the person murdered can be claimed through the murderer. He should be treated as non-existent when the succession opens on the death of his victim ; he cannot be regarded as a fresh stock of descent (*x*).

The foregoing statement of the law was laid down by the Privy Council in *Kenchava* v. *Girimalappa* (*y*). It was contended in that case that the Hindu law did not disqualify a murderer from succeeding to the estate of his victim, but their Lordships said that they did not take that view. Their Lordships further said that it was unnecessary to decide the point, and held that a murderer was disqualified upon the principles of justice, equity and good conscience.

A murderer cannot be regarded as a fresh stock of descent. He must be regarded as not existing when the succession opens on the death of his victim. The result is that not only is the murderer excluded from inheritance, but also his son (*z*), or his sister (*a*), or any other person claiming heirship through him. In Bombay, the wife of a murderer is not disentitled from succeeding to the estate of the murdered man. The reason is that she does *not* derive title *through* her husband, but succeeds *in her own right* as a gotraja sapinda (*b*).

P dies leaving his mother *C*, a son *H* and a daughter *K* of his father's brother, and his father's sister's son *G*. On *P*'s death his mother *C* succeeds to his property for the ordinary Hindu widow's estate. *H* is the next reversioner. *H* murders *C* and is sentenced to transportation for life. Who is entitled to succeed to the estate of *P* ? Not *H*, because he is the murderer. Is *H*'s sister *K* entitled to succeed ? No, because she could only claim through *H*, the murderer. *H* should be regarded as non-existent at the date of *C*'s death, so that the next heir to *P*'s estate is his father's sister's son *G*. *G* is therefore entitled to succeed to *P*'s estate : *Kenchava* v. *Girimalappa*, cited above.

It was held by the Madras High Court that the Hindu law being silent on the point, a murderer could only be excluded on the principle that no one shall be allowed to benefit by his wrongful act, and that the proper way to give effect to that maxim was not to exclude him from inheritance so as to prevent the *legal* estate vesting in him, but to exclude him from any *beneficial* interest in the property. In the Privy Council case cited above, their Lordships rejected the distinction made by the Madras High Court between the murderer's legal and beneficial interests, and said at p. 372 of the report : "The theory of legal and equitable estates is no part of Hindu law and should not be introduced into the discussion."

(*x*) *Kenchava* v. *Girimalappa* (1924) 51 I.A. 368, 48 Bom. 569, 82 I.C. 966, ('24) A.PC 209 ; affg. 45 Bom. 768, 61 I. C. 294, ('21) A. B. 270 [pat. aunt] ; *Vedanayaga* v. *Vedammal* (1904) 27 Mad. 591, [mother]; *Vedammal* v. *Vedanayaga* (1908) 31 Mad. 100 (mother) ; *Shah Khanum* v. *Kalandhar Khan* (1900) Punj. Rec. no. 74 [half mother] ; *Mst. Jind Kaur* v. *Indar Singh* (1922) 3 Lah. 103, 67 I.C. 526, ('22) A.L. 293.

(*y*) (1924) 51 I.A. 368, 48 Bom. 569, 82 I.C. 966, ('24) A.PC. 209.

(*z*) *Muhammad Khan* v. *Sis. Bano* (1906) Punj. Rec. no. 41 ; *Mst. Jind Kaur* v. *Indar Singh* (1922) 3 Lah. 103, 67 I.C. 526, ('22) A. L. 293.

(*a*) (1924) 51 I.A. 368, 48 Bom. 569, 82 I.C. 966, ('24) A. PC. 209.

(*b*) *Gangu* v. *Chandrabhagabai* (1908) 32 Bom. 275.

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100. Disability as excluding females.—The disabilities which exclude a male from inheritance also exclude a female from inheritance (*c*).

101. Effect of disability.—Where an heir is disqualified, the next heir of the deceased succeeds as if the disqualified person were dead (*d*). The disqualified person transmits no interest to his heir (*e*).

Illustrations.

(a) *A* dies leaving an insane son and a daughter. The daughter will take the inheritance as if the son were dead.

(b) *A* dies leaving two brothers *B* and *C*. *C* is insane and has a son *D*. *B* alone will inherit, for *D* is the nephew of the deceased, and a nephew cannot inherit while a brother is in existence.

As to murder, see notes to s. 99 above.

102. Disqualification only personal.—The disability is purely personal, and does not extend to the legitimate issue of the disqualified heir (*f*). Nor does it extend, in cases governed by the Bombay school of Hindu law, to his wife or widow (*g*). But adopted sons of disqualified heirs are not entitled to this heritable right (*h*).

Illustrations.

(*a*) *A* dies leaving a son *B* who is insane from birth, and a grandson by *B*. The grandson will succeed to *A* as *A*'s heir. [*Note* that the grandson succeeds as the heir of his grandfather *A*. He succeeds by his own merits, in other words, in his own right and does not step into his father's place.]

(*b*) *A* dies leaving a son *B* who is an idiot, a grandson who is the adopted son of *B*, and a daughter. The daughter will inherit *A*'s estate. A son adopted by a *disqualified* heir is not entitled to succession.

(*c*) A Hindu governed by the Bombay school of Hindu law dies leaving as his only heirs a brother who is disqualified from inheriting and the brother's wife. The brother's wife inherits to the deceased, though the brother is disqualified. [See secs. 64 and 68 above.]

According to the pure Hindu law, a son of a convert or outcast born after conversion or expulsion from caste is not entitled to inherit. But it has been held by the High Court of Allahabad that such a son is entitled to inherit, having regard to the provisions of the Caste Disabilities Removal Act, 1850 [see sec. 97, ill. (b)].

103. Disability arising after succession.—Property which has once vested in a person by inheritance is not divested by a subsequently supervening disability (*i*).

(*c*) *Bakubai* v. *Manchhabai* (1864) 2 Bom. H.C. 5.

(*d*) *Baboo Bodhnarain* v. *Omrao* (1870) 13 M.I.A. 519.

(*e*) *Musst. Bodha Kuer* v. *Musst. Sohodra Kuer* (1931) 11 Pat. 35, 132 I.C. 866, ('31) A.P. 367.

(*f*) Mit. II, 10.

(*g*) *Gangu* v. *Chandrabhagabai* (1908) 32 Bom. 275.

(*h*) Mit. II, 10, 11.

(*i*) *Deo Kishen* v. *Budh Prakash* (1883) 5 All. 509 [F.B.]; *Sanku* v. *Puttamma* (1891) 14 Mad. 289, 294; *Abilakh* v. *Bhekhi* (1895) 22 Cal. 864.

104. Removal of disability after succession has opened.— Where the disability is removed subsequent to the opening of the inheritance, the right to inheritance revives, but not so as to divest the estate already vested in another person (*j*). **Ss. 104-106**

Illustrations.

(a) *A* dies leaving a son who is insane and a widow. On *A*'s death the widow succeeds to the estate as his heir. The insanity is cured during the widow's life. The estate being vested in the widow, the son is not entitled to it during her lifetime. After the widow's death, however, the son as the nearest heir of *A*, is entitled to succeed to the estate, so that if *A* has left a brother also, the son, and not the brother will succeed.

(b) *A* dies leaving a son *X* who is insane and a brother *B*. On *A*'s death *B* succeeds to the estate. The lunacy is cured during *B*'s lifetime. *X* cannot recover the estate from *B*, for it is vested in *B*. Also on *B*'s death the estate will pass to *B*'s heirs, and not to *X*, for *B* took as *full owner*, so that if *B* dies leaving a son, it will pass to his son. But if *B* leaves no other heir than *X* (his brother's son), *X* will succeed to the estate not as the heir of *A*, but as the heir of *B*. The result is that where the estate of the father has passed to a *full* owner, a son whose disability has been removed cannot claim it as his *father's* heir, and he loses all right to it *as such*. It is different, however, where the estate has passed to a widow or other limited heir who takes only a widow's interest as in ill. (a).

105. After-born son of disqualified heir.—Where, after the succession has opened, a son is born to a disqualified heir, the son is not entitled to inherit so as to divest the estate already vested in another (*k*).

Illustration.

A dies leaving a son *B* who is insane, a widow, and a nephew. On *A*'s death, the widow inherits the estate. The widow then dies, and the nephew succeeds to the estate as *A*'s heir. A son, *C*, is then born to *B*, and he claims the estate from the nephew. He is not entitled to the estate, for it became vested in the nephew on the death of the widow.

EXCLUSION FROM PARTITION.

106. Disability and partition.—A disability which excludes a person from inheritance also excludes him from a share of the joint family property on partition (*l*). Where a member of a joint family had no congenital disqualification and therefore had acquired by birth an interest in the joint family property, a later supervening disqualification, while it might debar him from claiming a partition, would not prevent him from acquiring the whole property by survivorship (*m*). A Full Bench in Madras has recently held (Feb. 1, 1946) that even when the disqualification is congenital, the same result follows (L. P. A. 46 of 1945).

(*j*) Mitakshara, chap. ii, sec. 7 ; *Deo Kishen* v. *Budh Prakash* (1883) 5 All. 509 [F.B.].

(*k*) *Kalidas* v. *Krishan* (1869) 2 Beng. L.R. [F.B.] 103 ; *Deo Kishen* v. *Budh Prakash* (1883) 5 All. 509 [F.B.]; *Pawadewa* v. *Venkatesh* (1908) 32 Bom. 455.

(*l*) *Ram Sahye* v. *Lalla Lalljee* (1882) 8 Cal. 149 ; *Ram Soonder* v. *Ram Sahye* (1882) 8 Cal. 919.

(*m*) *Muthusami* v. *Meenammal* (1920) 43 Mad. 464, 55 I.C. 576 ; *Mt. Dilraj Kuari* v. *Rikheshwar Ram Dube* (1934) 13 Pat. 712, 151 I.C. 419, ('34) A. P. 373, (lunacy); *Moolchand* v. *Chahta Devi* (1937) All. 825, 170 I.C. 833, ('27) A. A. 605 [F.B.]. (leprosy).

Ss. 106-109

There may be such a severance of the joint status as would put an end to the right of succession by survivorship (*n*). But if the other same coparceners separate their shares and disrupt the joint family the lunatic member may become separate owner of his share (*o*). See sec. 98 above.

107. Lunacy and partition.—(*1*) The High Court of Calcutta (*o1*) has held that a member of a joint family who was *not born* a lunatic, but is a lunatic *at the time of partition*, is not entitled to claim his share by partition. This is also the opinion of the High Court of Allahabad(*o2*).

(*2*) Under the Hindu Inheritance (Removal of Disabilities) Act, 1928, such a person, not having been a lunatic *from birth*, is entitled to a share.

The line of reasoning adopted by the High Court of Calcutta is that just as an heir who is a lunatic *when the succession opens* is not entitled to a share of the inheritance, so a coparcener who is a lunatic *at the time of partition* is not entitled to a share of the joint family property on partition. The line of reasoning followed by the High Court of Allahabad is that a coparcener who is not a lunatic *at the time of his birth* acquires an interest *from birth* in the joint property, and the interest, having vested in him by birth, cannot be divested by his subsequent lunacy.

108. Removal of disability reopens partition.—A coparcener who is excluded from a share on partition by reason of a disability is entitled, on removal of the disability, to the same rights as a son born after partition (*p*). [Sec. 310].

109. A disqualified coparcener having sons.—Where a son is born to a disqualified coparcener after the death of the ancestor, he is not, according to the Bombay decisions (*q*), entitled to take a share by divesting the coparcener in whom the ancestor's share vested on his death. The High Court of Madras has arrived at a contrary conclusion (*r*). Following the principle of this decision the same High Court has held that an idiot (even where the idiocy is congenital) who marries and has children is a coparcener with his father (though he cannot claim a share by partition) and that a will executed by the father during the lifetime of the son is invalid (*s*).

(*n*) *Venkateswara* v. *Mankayammal* (1935) 69 Mad. L. J. 410, ('35) A. M. 775.

(*o*) *Bhagwati Saran Singh* v. *Parameshwari Nandar Singh* (1942) All. 518, 202 I.C. 227, ('42) A.A. 267.

(*o1*) (1882) 8 Cal. 149, *supra*; (1882) 8 Cal. 919, *supra*.

(*o2*) *Bhagwati Saran Singh* v. *Parameshwari*, *supra*.

(*p*) Mitakshara, chap. ii, s.10, paras. 6-7.

(*q*) *Bapuji* v. *Pandurang* (1882) 6 Bom. 616; see also *Powadewa* v. *Venkatesh* (1908) 32 Bom. 455.

(*r*) *Krishna* v. *Sami* (1886) 9 Mad. 64 [F.B.].

(*s*) *Amirthammal & Ors.* v. *Vallimayil Ammal* (1942) Mad. 807, 203 I.C. 648, ('42) A.M. 693.

Illustration.

A, his son *B*, and his brother *C*, are members of a Mitakshara joint family. *B* is insane. *A* dies, and on his death his undivided coparcenary interest passes to his brother *C* by survivorship. After *A*'s death, a son is born to *B*. *B*'s son sues *C* to recover the half share of his grandfather *A* in the joint family property. According to the Madras decision, he is entitled to the share; according to the Bombay decision, he is not.

MISCELLANEOUS.

110. Maintenance of disqualified heirs.—Where a person is excluded from inheritance on account of a disability, he and his wife and children are entitled to maintenance out of the property which he would have inherited but for the disability and where he is excluded from a share on partition, he and his wife and his children are entitled to have a provision made for their maintenance out of the joint family property (*t*).

111. Adoption of religious order.—Where a person enters into a religious order renouncing all worldly affairs, his action is tantamount to civil death, and it excludes him altogether from inheritance and from a share on partition (*u*).

All property which belongs to such a person at the time of renunciation passes immediately on his renunciation to his heirs, but property acquired by him subsequent to the renunciation passes to his spiritual heirs [s. 58]. A person does not become a *sanyasi* by merely declaring himself a sanyasi or by wearing clothes ordinarily worn by sanyasi. He must perform the ceremonies necessary for entering the class of sanyasis; without such ceremonies he cannot become dead to the world (*v*).

Sudras.—The Hindu texts applicable to the disinheritance of ascetics do not apply to Sudras, unless a usage to that effect is established. The reason is that a Sudra cannot enter the order of *Yati or Sanyasi* (*w*).

(*t*) *Ram Sahye* v. *Lalla Laljee* (1882) 8 Cal. 149; *Ram Soonder* v. *Ram Sahye* (1882) 8 Cal. 919, Mitakshara, chap. ii, s. 10.

(*u*) *Teeluck* v. *Shama* (1864) 1 W.R. 209.

(*v*) *Baldeo Prasad* v. *Arya Priti Nidhi Sabha* (1930) 52 All. 789, 124 I.C. 761, ('30) A. A. 643; *Kondol Row* v. *Swamularu* (1917) 33 Mad. L. J. 63, 40 I. C. 535, ('18) A.M. 402; *Ramdhan* v. *Dalmir* (1909) 14 C.W.N. 191, 2 I.C. 385.

(*w*) *Harish Chandra* v. *Atir Mahmud* (1913) 40 Cal. 545, 18 I.C. 474; *Somasundaram* v. *Vaithilinga* (1917) 40 Mad. 846, 41 I.C. 546, ('18) A.M. 794.

CHAPTER X.

WOMAN'S PROPERTY.

PART I—STRIDHANA.

Note.—For a thorough understanding of this chapter the reader is advised first to read ss. 8 and 9. He is also advised to learn by heart the names of the various commentaries which are recognized as authorities in the different schools given in ss. 11 and 12. Unless he learns these names by heart, he will not be in a position to understand what follows. He must remember that the subject of stridhana is by far the most difficult branch of Hindu law, and he must, therefore, study each section thoroughly before proceeding with the next section. The difficulty of the subject may be gauged from what Jimuta Vahana says in the Dayabhaga after finishing his discourse on stridhana. "Thus has been explained *the most difficult subject* of succession to a childless woman."

1. STRIDHANA ACCORDING TO THE SMRITIS, THE COMMENTARIES AND JUDICIAL DECISIONS.

S. 112 **112. Different meanings of stridhana.**—The word "stridhana" is derived from *stri*, woman, and *dhana*, property. It means, literally woman's property. It is used, however, in different senses in different schools. In order to understand the precise meaning of stridhana according to the various schools, it is necessary to know what kinds of properties were recognized as stridhana in the *Smritis*, that is to say, by the *Rishis* or sages of antiquity (s. 8). We shall, therefore, take the reader as briefly as possible through the definitions, or rather descriptions of stridhana, as given by some of those sages, beginning with Manu and ending with Yajnavalkya (s. 113). Next we shall state the definition of stridhana as given in the Mitakshara. We shall then see how Vijnaneswara, the author of the Mitakshara, seized on one particular word in Yajnavalkya's definition of stridhana, (the word, or rather the suppletive term, *ádya*, which means 'and the *rest*' or '*et cetera*'), and used it as a handle for extending the scope of stridhana so as to include in it several descriptions of property which were not recognized as stridhana before (s. 115). We shall next proceed to consider to what extent the

definition of stridhana as given in the Mitakshara has been adopted in the four Mitakshara sub-schools (ss. 116-119). Thereafter, we shall deal with the Bengal or Dayabhaga school, and note how Jimuta Vahana, the founder of that school, boldly rejected the Mitakshara definition of stridhana, and formulated a definition of his own (s. 120). Lastly, we shall note how the Judicial Committee, has notwithstanding repeated warnings given by it that the Courts of British India should take the Hindu law not from the Smritis, but from the commentaries (s. 9), brushed aside the whole of Vijnaneswara's expansion of the word *adya* (s. 122). After this preliminary inquiry, we shall proceed to deal with the subject of stridhana in the light of decided cases. **Ss. 112, 113**

113. Stridhana according to the Smritis that is, the sacred writings of Rishis or sages of antiquity.—(*1*) Stridhana or woman's property is according to *Manu*, of *six* kinds, namely :—

1. Gifts made before the nuptial fire, explained by Katyayana to mean gifts made at the time of marriage before the fire which is the *witness* of the nuptials [*adhyagni*].
2. Gifts made at the bridal procession, that is, says Katyayana, while the bride is being led from the residence of her parents to that of her husband [*adhyavahanika*].
3. Gifts made in token of love, that is, says Katyayana, those made through affection by her father-in-law and mother-in-law [*pritidatta*], and those made at the time of her making obeisance at the feet of elders [*padavandanika*].
4. Gifts made by the father.
5. Gifts made by the mother.
6. Gifts made by a brother (*Manu*, ix, 194).

All the commentators are agreed that the above is not an exhaustive enumeration of stridhana.

(*2*) To the above list *Vishnu* adds—

1. Gifts made by a husband to his wife on supersession, that is, on the occasion of his taking another wife [*adhivedanika*].

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2. Gifts subsequent, that is, says Katyayana, those made *after* marriage by her husband's relations or her parent's relations [*anwadheyaka*].

3. *Sulka*, or marriage-fee, a term which is used in different senses in different schools [see ss. 147, 150, 152, 153 and 154].

4. Gifts from sons and relations.

Vishnu does not make any specific mention of gifts made at the bridal procession.

(*3*) Katyayana mentions the same six kinds of stridhana as Manu, and he defines the first three enumerated by Manu, and "gifts subsequent" and "sulka" mentioned by Vishnu. Those definitions have already been given above except that of *sulka*. It is of importance to note that Katyayana's definition of *adhyagni*, gifts before the nuptial fire, and that of *adhyavahanika*, gifts at the bridal procession are wide enough to include gifts from *strangers*. These definitions have been accepted by all the schools including the Dayabhaga school, with the result that they all recognize as stridhana gifts from strangers when they are made before the nuptial fire or at the bridal procession. But Katyayana expressly excludes from the category of stridhana gifts made by strangers *during coverture*, as also property acquired by a woman during *coverture* by mechanical arts. Thus he says :—

"The wealth which is *earned by mechanical arts*, or which is received through affection *from a stranger*, is subject to her husband's dominion. The *rest* is pronounced to be stridhana." [*Katyayana*, cited in the Dayabhaga, chap. 4, sec. 1, para. 19.]

Gifts from strangers referred to in the above text are, of course, exclusive of gifts made before the nuptial fire and at the bridal procession. Such gifts are undoubtedly stridhana.

The words, "subject to her husband's dominion," indicate that the text cited above is evidently not applicable to gains of art or to gifts from strangers either *during maidenhood or during widowhood*. The said words refer to acquisitions and gifts from strangers *during coverture*. Therefore acquisitions and gifts from strangers during maidenhood or widowhood would constitute stridhana.

(4) It is not necessary to notice here the definitions of stridhana given by *Narada*, *Apastamba*, *Vyasa*, *and Devala* except that Devala refers to "food and vesture" [s. 119] as constituting a woman's stridhana [Colebrooke's Digest, Book V, pp. 471, 478]. S. 113

It may be observed before passing further that almost all the Smriti writers mention ornaments given by a husband to his wife as her stridhana.

(5) *Yajnavalkya* defines stridhana thus:—"What was given (to a woman) by the father, the mother, the husband, or a brother, or received by her before the nuptial fire, or presented to her on her husband's marriage to another wife, *and the rest* (*ádya*) is denominated stridhana. So, that which is given by kindred, as well as her marriage-fee (*sulka*) and anything bestowed after marriage." [Note *particularly* the word "*ádya*" in the above definition.]

Though there are about eighty different *Rishis* (sages) or writers of *Smritis* (institutes), the texts of the abovenamed eight *rishis* are the only ones to which reference is made by the Commentators in their disquisitions on the definition of stridhana. Those eight sages are: (1) Manu, (2) Narada, (3) Vishnu, (4) Katyayana, (5) Apastamba, (6) Vyasa, (7) Devala and (8) Yajnavalkya.

(6) So far, we have noted the different kinds of property which are recognized as stridhana by the old sages. It is clear from the *Smritis* of those sages that the term stridhana is not used in its etymological sense of "woman's property," as comprising *any* kind of property possessed by a woman but that it is used in a technical sense. Summarizing the *Smriti* texts, we may say that *it is only gifts obtained by a woman from her relations and her ornaments and apparel which constitute her stridhana and that the only sorts of gifts from strangers which come under that denomination are presents before the nuptial fire and those made at the bridal procession. But neither gifts obtained from strangers at any other time, nor her acquisitions by labour and skill, constitute her stridhana* (*x*). This is stridhana in its *technical* sense. The Mayukha calls it *technical* stridhana; it comprises only those kinds of property which are *expressly* called stridhana by the old sages or Smriti writers.

(*x*) See Banerjee's "Hindu Law of Marriage and Stridhana," 5th ed., p. 327.

S. 114 **114. Stridhana according to the Commentators (ss. 115-120).**—We now proceed to note how the *Commentators* of the different schools have dealt with the definitions of stridhana as given by the Smriti writers, and deduced their own definitions therefrom. This inquiry is very important, for it is well established that whatever may be the law intended to be laid down by the Smriti writers, that law must be sought for in the writings of the Commentators. In determining what is stridhana according to a particular school, the Court has to look to what the Commentators, who are authorities in that particular school, have said on the subject (*y*). It is not open to a Judge to put his own interpretation on the Smriti texts. If the texts have received a particular interpretation in a particular school, and that interpretation has been accepted as the law of that school, he must take it as the law of that school and administer it as such (*z*) [s. 9]. To this extent then the Smritis have been pushed into the background.

The Mitakshara occupies the foremost position among all the *Commentaries*. It is universally accepted by all the schools, except the Bengal school, as of the highest authority. Even in Bengal it is received as of high authority yielding only to the Dayabhaga in those points where they differ. It is a commentary on the Yajnavalkya Smriti or the institutes of Yajnavalkya. The Dayabhaga wherever it differs from the Mitakshara prevails in Bengal; but in matters on which the Dayabhaga is silent, the Mitakshara is followed even in Bengal. These two works gave rise to two schools, namely, (1) the Mitakshara school, and (2) the Dayabhaga or Bengal school.

The Mitakshara school is sub-divided into four schools, namely, the Benares, Bombay, Mithila and Madras schools. These four schools have their particular treatises and commentaries which control certain passages of the Mitakshara. All these schools acknowledge the supreme authority of the Mitakshara, but they follow their own particular treatises where those treatises specifically differ from the Mitakshara. The treatises which have been accepted as special authorities in each of these four schools are mentioned in section 12.

(*y*) *Salemma* v. *Lutchmana* (1898) 21 Mad. 100, 102.

(*z*) *Collector of Madura* v. *Moottoo Ramalinga* (1868) 12 M.I.A. 397, 436.

We now proceed to consider definitions of stridhana as given by the Commentators. This forms the subject-matter of sections 115 to 120. Ss. 114, 115

115. Stridhana according to the Mitakshara.—The following is the definition of stridhana as given by Vijnaneswara in the Mitakshara :—

"That which was given by the father, by the mother, by the husband, or by a brother ; and that which was presented by the maternal uncles and the rest at the time of wedding before the nuptial fire ; and a gift on a second marriage or gratuity on account of supersession ; and, as indicated by the word *adya* (and the rest), property obtained by—

(1) inheritance ;

(2) purchase ;

(3) partition ;

(4) seizure, *e.g.*, adverse possession (*a*) ;

(5) finding ;

all this is stridhana according to Manu and the rest."

It will thus be seen that the first portion of the above definition is a reproduction of the definition of stridhana as given by Yajnavalkya. The second part of the above definition is the *expansion* by Vijnaneswara of the word *adya* which occurs in Yajnavalkya's definition of stridhana, so as to include in stridhana five distinct kinds of property which were not recognized as stridhana by the early sages. Neither Manu nor the other sages ever recognized those kinds of property as stridhana. Manu recognized only *six* kinds of stridhana, but this Vijnaneswara explains by saying that all that was meant by Manu's text is that the number cannot be less than six, not that it cannot be more than six. And, further, he expressly says that *the term stridhana comforms in its import with its etymology, and is not technical. The result is that according to the Mitakshara, property of any description belonging to a woman is stridhana.* It may be a gift from relations or a gift from strangers (*b*). It may be property acquired by inheritance, or property obtained on partition. It may be her earnings (*b*) or it may be property

(*a*) *Subramanian* v. *Arunachelam* (1905) 28 Mad. 1, 7.

(*b*) *Salemma* v. *Lutchmana* (1898) 21 Mad. 100, 103-105.

Ss. 115-117 acquired by her *from any other source* [*Mitakshara,* chap. 2, sec. 11, paras. 2-4].

Referring to the above definition, the High Court of Madras said: "It is scarcely necessary to say that Vijnaneswara's statement that stridhana is not to be understood in a technical sense was not mere philological observation. By laying down that proposition, Vijnaneswara and other great commentators, who followed him, succeeded in effecting a beneficial change in the archaic Smriti law and placed women almost on a footing of equality with men as regards the capacity to hold property" (*c*).

[It may just as well be noted here that since the decision of the Privy Council in 1912 [s. 122], the whole of Vijnaneswara's "expansion" has been discarded].

116. Stridhana according to the Bombay School.—We next turn to the four divisions of the Mitakshara school (s. 12). It will be seen that some of them adopt the Mitakshara definition while others do not.

The Mayukha, which is held in high esteem in the town of Bombay, in Gujarat and in the North Konkan, would seem to adopt the definition of stridhana as given in the Mitakshara [s. 115].

For the purposes of *succession*, the Mayukha divides stridhana into two classes, namely, (1) technical, and (2) non-technical. Technical stridhana refers to the kinds of property *expressly* recognized as stridhana by the old sages [sec. 113, sub-sec. (*6*)], that is to say, (1) gifts from *relations* made at any time, and (2) gifts from strangers if made before the nuptial fire or at the bridal procession. Non-technical stridhana comprises every other kind of property belonging to a woman. This is a classification peculiar only to the Mayukha [*Mayukha,* chapter iv, sec. 10, paras. 1-2 and 26]. It is not followed in any other part of the Bombay Presidency where the Mitakshara alone is the governing authority.

117. Stridhana according to the Benares School.—The Viramitrodaya, a commentary held in high esteem in the Benares school, *adopts and supports* the definition of stridhana given in the Mitakshara.

(*c*) *Salemma* v. *Lutchmana* (1898) 21 Mad. 100, 103-104.

118. Stridhana according to the Madras School.—The principal treatises of the Madras school are the Smriti Chandrika and the Parasara Madhavya. These treatises do not give any definition of stridhana. Nor do they adopt the definition of stridhana given in the Mitakshara. The Smriti Chandrika enumerates certain kinds of property as stridhana, being the kinds of property recognized as stridhana by the Smriti writers. The Parasara Madhavya puts its own interpretation on the suppletive term *adya* in the text of Yajnavalkya, and says that it refers to property purchased by a woman with gifts made to her at the bridal procession, etc. **S. 118**

Besides the two works mentioned above, there are other works which are of more or less authority in the Madras school namely the Sarasvati Vilasa and the Vyavaharanirnaya. These four treatises, however, do not agree with each other on all points, least of all on questions relating to stridhana. This has led the High Court of Madras to hold that in determining the question whether a particular kind of property is stridhana or not, the Court should follow the comprehensive definition of stridhana given in the Mitakshara and hold that it is stridhana, unless it is shown that the said treatises are *unanimous* in holding that it is not stridhana (*d*). It has accordingly been held by that Court following the definition of stridhana given in the Mitakshara, that *money* given absolutely to a woman for her maintenance, and purchases made with such money, constitute her stridhana and descend to her heirs (*e*). Similarly, it has been held that gifts from strangers, though made during coverture, constitute her stridhana, there being no consensus of opinion among the said treatises that such gifts are not to be regarded as stridhana (*f*). As to a wife's earnings, the same Court has expressed a strong opinion that they are her stridhana and descendible to her heirs (*g*). A similar opinion has been expressed as to property acquired by a woman by "seizure," that is, adverse possession, and that acquired by finding (*h*). Property *inherited* by a woman, however, stands on a different footing, for as to that it has been settled by a long line of decisions that it is not stridhana according to the Madras

(*d*) *Salemma* v. *Lutchmana* (1898) 21 Mad. 100, 103-104.

(*e*) *Subramanian* v. *Arunachelam* (1905) 28 Mad. 1.

(*f*) 21 Mad. 100, *supra*.

(*g*) 21 Mad. 100, 105, *supra*.

(*h*) 28 Mad. 1, 7, *supra*.

Ss. 118, 119 school. As to property obtained by a woman on *partition*, no question can arise in the Madras school as to whether or not it is stridhana, for the practice of allotting shares to a woman on partition has become obsolete in the Madras Presidency (*i*). This completes the list of the additional sorts of stridhana specifically enumerated in the Mitakshara [s. 115]. In fact, the tendency of the Madras High Court is to follow the Mitakshara in determining whether a particular kind of property is stridhana or not. Even as to rules of succession to stridhana, that Court has followed the Mitakshara where the said four commentaries are silent (*j*) or do not all agree with each other (*k*). Referring to the definition of stridhana given in the Mitakshara that Court said: "It is scarcely necessary to say that Vijnaneswara's statement that stridhana is not to be understood in a technical sense was not mere philological observation . . . . A departure from the law, laid down by such a high authority, must not be made *unless supported by adequate grounds*" (*l*). And as to the rules of succession to stridhana, the same Court said: "While the other commentators, in their attempt to reconcile the various Smritis, complicate the matter by prescribing different lines of devolution—those too not complete—according to the class of stridhana to which the particular property belongs, the Mitakshara lays down rules which are easy of application, complete in themselves and on the whole equitable (*m*)."

The position, then, as regards the Madras school, so far as the Madras decisions go, is this that the Mitakshara definition of stridhana is to be applied in every case, unless the commentaries prevalent in that school unanimously exclude the kind of property in question from the category of stridhana. Since the decision, however, of the Privy Council, in 1912 (s. 122), the whole of Vijnaneswara's "expansion" [s. 115] has been discarded, and such of the Madras decisions which recognized as stridhana any description of property comprised in the "expansion" cannot now be accepted as good law.

119. Stridhana according to the Mithila School.—The Vivada Chintamani is the leading authority of the Mithila

(*i*) *Subramanian* v. *Arunachelam* (1905) 28 Mad. 1, 8.

(*j*) *Salemma* v. *Lutchmana* (1898) 21 Mad. 100, 104.

(*k*) *Raju* v. *Ammani* (1906) 29 Mad. 358; *Muthappudayan* v. *Ammani* (1898) 21 Mad. 58.

(*l*) 21 Mad. 100, 103-104, *supra*.

(*m*) 21 Mad. 100, 104, 105, *supra*.

school. This work also does not give any definition of stridhana, but it enumerates eleven kinds of property, namely :— Ss. 119, 120

(1-6) the six kinds as enumerated by Manu and defined by Katyayana [s. 113, sub-s. (*1*)];

(7-9) gifts made on supersession, gifts subsequent, and *sulka* [s. 113, sub-s. (*2*)];

(10) ornaments; and

(11) "food and vesture" mentioned by Devala and interpreted to mean "funds appropriated to a woman's support" [s. 113, sub-s. (*3*)].

Gifts from strangers made before the nuptial fire and at the bridal procession are also recognized as stridhana. The author then concludes his enumeration by saying: "These are the several kinds of stridhana." It will thus be seen that the Vivada Chintamani confines stridhana within the definitions of the Smriti writers and excludes property acquired by inheritance and the other kinds of property mentioned as stridhana in the Mitakshara (*n*). [*Vivada Chintamani*, P.C. Tagore's Translations, pp. 256-263.]

120. Stridhana according to the Dayabhaga or Bengal School.—The Dayabhaga of Jimuta Vahana is the leading authority of the Bengal school. To understand the definition of stridhana as given in the Dayabhaga it is important to note the following two propositions which have been accepted by all the Mitakshara sub-schools :—

(a) *every* kind of stridhana belonging to a woman passes on her death to *her* heirs;

(b) but *every* kind of stridhana cannot be disposed of by a woman at her pleasure.

The only kinds of stridhana which she can dispose of at her pleasure and without her husband's consent are *gifts from relations*. She cannot dispose of any other kind of stridhana such as gifts from *strangers*, or property acquired by her *by mechanical arts*, without her husband's consent

(*n*) *Bhugwandeen* v. *Myna Baee* (1867) 11 M.I.A. 487, 511.

S. 120 [s. 143]. This is based upon certain texts of Katyayana and Narada. The said texts run as follows:—

(1) "What a woman, either after marriage or before it, either in the mansion of her husband or of her father, receives from her lord or her parents, is called *saudayika* (gift from affectionate kindred); and such a gift having by them been presented through kindness, that the woman possessing it may live well, is declared by law to be her absolute property. The absolute exclusive dominion of women over such a gift is perpetually celebrated; and they have power to sell or give it away as they please, even though it consists of lands and houses. Neither the husband, nor the son, nor the father, nor the brother, has power to use or to alienate the legal property of a woman"—*Katyayana* [Colebrooke's Digest, Book V., p. 475].

(2) "The wealth which is earned *by mechanical arts*, or which is received through affection *from a stranger*, is subject *to her husband's dominion*. The rest is pronounced to be stridhana" [*Katyayana*, cited in the Dayabhaga, chap. 4, sec. 1, para. 19].

(3) "Property given to her by her *husband* through pure affection she may enjoy at her pleasure *after his death*, or may give it away, *except land or houses*"—*Narada* [Colebrooke's Digest, Book V., p. 477].

Let us now turn to the Dayabhaga of Jimuta Vahana. On referring to that work it will be seen that Jimuta Vahana first examines the various definitions, or rather descriptions, of stridhana given in the old Smriti texts [s. 113]. He alters the text of Yajnavalkya by substituting the expletive *eva* for *ádya* so as to confine the term stridhana to the kinds of property *specifically* enumerated by *Yajnavalkya* [s. 113, sub-sec. (5)]. He rejects the definition of stridhana given in the Mitakshara, and defines stridhana in these words:—

"*That alone is stridhana which she (a woman) has power to give, sell, or use independently of her husband's control.*"

Jimuta Vahana, however, does not say what kinds of property can be disposed of by a woman without her husband's consent but immediately after defining stridhana, he cites the texts of Katyayana and Narada quoted above. In

the light of those texts, and from what more he says in the chapter on stridhana we are in a position to say—

(1) *affirmatively*, that all gifts from *relations constitute* stridhana, except a gift of *immoveable* property made by the *husband;* and that gifts from strangers also constitute stridhana if made before the nuptial fire or at the bridal procession;

(2) *negatively*, that the following properties are not stridhana, namely—

(i) property *inherited* by a woman;

(ii) property obtained by her *on partition;*

(iii) gifts from *strangers*, except those made before the nuptial fire or at the bridal procession; and

(iv) property acquired by her *by mechanical arts* (*o*) [*Dayabhaga*, chap. 4, sec. 1].

121. Distinction between Mitakshara stridhana and Dayabhaga stridhana.—In *Sheo Shankar* v. *Debi Sahai* (*p*), their Lordships of the Privy Council referring to the term stridhana said: "The Bengal school of lawyers have always limited the use of the term narrowly, applying it exclusively, or nearly exclusively, to the kinds of woman's property enumerated in the primitive sacred texts. The author of the Mitakshara and some other authors (that is of the Viramitrodaya and the Mayukha) seem to apply the term broadly to every kind of property which a woman can possess, *from whatever source it may be derived.*"

122. The Privy Council and Mitakshara Stridhana.—Having dealt with the definitions of stridhana as given by the Commentators, we proceed to consider how far the definition of stridhana as given in the Mitakshara has been accepted by the Privy Council.

(1) *Property inherited by a woman.*—A woman may inherit the ordinary property of a male, that is of her husband, father, son, etc. She may also inherit the stridhana of a female, that is of her mother, mother's mother, or daughter. Both these kinds of inherited property are stridhana according to the

(*o*) *Ram Gopal* v. *Narain* (1906) 33 Cal. 315, 319-320.

(*p*) (1903) 25 All 468, 30 I. A. 202, 205-206.

S. 122 Mitakshara [s. 115], but the Privy Council has held as to both these kinds of property that they are not stridhana. In one set of cases before that tribunal, the question was whether property inherited by a widow from her husband, that is property inherited by a woman *from a male*, was her stridhana. Their Lordships held that it was not, and that on her death it passed not to her heirs, but to the next heir of her husband (*q*). In the other set of cases the question was whether stridhana inherited by a daughter from her mother, that is property inherited by a woman *from a female*, was her stridhana. Their Lordships held that it was not, and that it did not descend to her (daughter's) stridhana heirs, but to the next heir of the mother (*r*).

The cases referred to above were cases from the Benares school. The law as now settled in the Madras, Mithila and Bengal schools is the same, that is to say that property inherited by a woman, whether from a male or from a female, does not constitute her stridhana in any case [ss. 168-169]. According to the Bombay school, however, it becomes her stridhana in all cases, except where the property is inherited by a widow, mother, or other female who enters the *gotra* (family) of the deceased by marriage [ss. 170-171]. This rule is firmly established in Bombay by a long current of decisions, and it remains unaffected by the decisions of the Privy Council referred to above (*s*). [See s. 130].

(2) *Share obtained by a widow on partition.*—As to the share obtained by a widow on partition of the joint family property, it has been held by the Privy Council in *Debi Mangal Prasad* v. *Mahadeo Prasad* (*t*), that it is not her stridhana even under the Mitakshara law. It does not therefore pass on her death to her stridhana heirs, but reverts on her death to the next heirs of her husband in the absence of an express agreement amongst the co-sharers to the contrary.

(*q*) *Bhugwandeen* v. *Myna Baee* (1867) 11 M.I.A. 487; *Mst. Thakor Deyhee* v. *Rai Baluk Ram* (1866) 11 M.I.A. 139.

(*r*) *Sheo Shankar* v. *Debi Sahai* (1903) 25 All. 468, 30 I.A. 202, as explained in *Subramanian* v. *Arunachelum* (1905) 28 Mad. 1, 9-12; *Ram Kali* v. *Gopal Dei* (1926) 48 All. 648, 652-653, 96 I.C. 757, ('26) A.A. 557, and *Hukum Chand* v. *Sital Prasad* (1928) 50 All. 232, 236, 237, 107 I.C. 244, ('28) A.A. 52; *Sheo Pertab* v. *The Allahabad Bank* (1903) 25 All. 476, 30 I.A. 209; *Gaya Din* v. *Badri Singh* (1943) All. 230.

(*s*) See (1903) 25 All. 468, 474, 30 I.A. 202, *supra*; *Balwant Rao* v. *Baji Rao* (1920) 47 I.A. 213, 223, 48 Cal. 30, 57 I.C. 545, ('21) A.P.C. 59; *Bhau* v. *Raghunath* (1906) 30 Bom. 229, 236-237; *Gadadhar* v. *Chandrabhagabai* (1893) 17 Bom. 690, 708 [F.B.]; *Kesserbai* v. *Hunsraj* (1906) 30 Bom. 431, 452.

(*t*) (1912) 34 All. 234, 39 I.A. 121, 14 I.C. 1000.

(3) It will be noted that property acquired by a woman by *inheritance* and that acquired by her on *partition* are two of the five additional sorts of stridhana comprised in Vijnaneswara's "expansion" of *adya* [s. 115]. As to both these it has been held by the Privy Council that they do not constitute her stridhana in such sense that on her death it passes to her stridhana heirs. The true view would now appear to be that the whole of Vijnaneswara's expansion has been discarded. **Ss. 122, 123**

123. The schools and stridhana.—The following is a summary of secs. 113 to 122 :—

(1) The Smriti writers confine stridhana to gifts from relations made at any time, and to gifts from strangers made before the nuptial fire and at the bridal procession. This is called *technical* stridhana [s. 113, sub-s. (*6*)], and it is stridhana according to all the schools.

(2) Property acquired by a female during *maidenhood* or *widowhood*, though it be acquired by gift from strangers or by mechanical arts, constitutes her stridhana according to all the schools [ss. 127-132].

(3) Though according to the Mitakshara every kind of property howsoever acquired by a woman would appear to be her stridhana, the effect of the decisions of the Privy Council referred to in section 122 is to curtail the definition of stridhana as propounded by Vijnaneswara by excluding from it in effect the five additional sorts of stridhana enumerated by him [s. 115].

(4) The law of the Benares school is that stated in sub-sec. (*3*) [ss. 117 and 122].

(5) Every description of property which is stridhana according to the Mitakshara as interpreted by the Privy Council would seem to be stridhana according to the Bombay school. That school also recognizes as stridhana every kind of property *inherited* by a woman, except where the woman inheriting the property is a widow, mother, or other female who entered the *gotra* of the deceased owner by marriage [s. 130]. See ss. 116 and 122.

(6) Having regard to the Madras decisions set forth in sec. 118, it would seem that every description of property

S. 123 which is stridhana according to the Mitakshara as interpreted by the Privy Council, is stridhana according to the Madras school.

(7) The Mithila school confines stridhana within the definitions of the Smriti writers; it does not recognize non-technical stridhana [s. 119].

(8) According to the Dayabhaga or Bengal school, that alone is stridhana which a woman has power to dispose of without the consent of her husband [s. 120].

(9) Property which comes within any of the descriptions of stridhana is not the less stridhana, because it happens to be a kind of property which was not known to the Hindu law when the Commentaries were written. "We are not prepared," said the High Court of Calcutta in a Dayabhaga case, "to hold that the rules of Hindu law are so inelastic as to be capable of application only to such descriptions of interests in property as formed the subject-matter of transactions at the time when the rules were first formulated." Thus a gift by a father to his daughter is stridhana according to all the schools: and it is not the less stridhana, because the gift is of a *maurasi mokarari* lease, a sort of interest in property unknown to the Hindu law when the Dayabhaga was written (*u*).

(10) It will be seen from what is stated above, that the stridhana of the Bombay school is more extensive than the stridhana of every other school, for the Bombay school, while recognizing as stridhana every kind of property which is stridhana according to the other schools, recognizes in certain cases inherited property also as stridhana, which no other school does.

To say of a property possessed by a woman that it is her stridhana is the same thing as saying that she is the *full owner* thereof. To say that the stridhana of the Dayabhaga school is less comprehensive than that of the Bombay school, is equivalent to saying that the Dayabhaga school does not recognize the *full ownership* of women in as many kinds of property as the Bombay school; but though this is so, females governed by the Dayabhaga school possess an advantage which females subject to the Mitakshara law do not. For while according to the Mitakshara law, the interest of a coparcener in ancestral property passes on his death to his coparceners *by survivorship*, according to the Dayabhaga law, it passes to his heir by *succession*. The result is that according to the Mitakshara law, a widow, daughter, mother, etc., can never succeed to ancestral property so long as a single coparcener is in existence; while according to the Dayabhaga law, their succession is not impeded by the existence of any coparcener. Thus if two

(*u*) *Ram Gopal* v. *Narain* (1906) 33 Cal. 315, 319.

brothers *A* and *B* are joint, and *A* dies leaving a widow, or a daughter, or a mother, according to the Mitakshara law, *A*'s interest in the joint property will pass on his death not to his widow, or daughter, or mother, but to *B* by survivorship, while according to the Dayabhaga law, it will pass to his widow, daughter or mother as the case may be, though, it may be noted, none of them takes as a *full owner* [ss. 177-180].

II.—SPECIAL FEATURES OF STRIDHANA.

124. Peculiar features of Stridhana.—A Hindu female may acquire property from various sources. She may acquire it by gift, or by inheritance, or on partition. She may also acquire it by her own labour and skill. But all property acquired by her is not stridhana. Whether a particular kind of property is stridhana or not, depends on—

(1) the *source* from which the property was acquired;

(2) her *status* at the time of acquisition, that is, whether she acquired it during maidenhood, coverture, or widowhood; and lastly,

(3) the *school* to which she belongs.

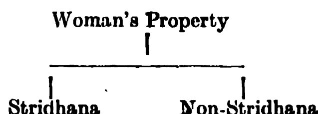
What is stridhana, and what is not, according to the different schools, we have already stated in section 123 and the earlier sections. We shall elucidate this subject still further by treating it from a practical point of view, that is, by enumerating all possible descriptions of property that may be lawfully acquired by a Hindu female, and dealing with each one of these descriptions separately in separate sections, and stating which of them are stridhana and which are not according to the different schools [ss. 125 to 135]. In the meantime it may be asked, what is the practical importance of the distinction between property which is stridhana and property which is not stridhana? The answer is that the distinction is important in two ways: *first*, as regards *succession* and, *secondly*, as regards the *power* of *alienation*. The distinction may be explained as follows:—

1. Stridhana of every description belonging to a woman passes on her death to her heirs [ss. 145-157]. It is not so with regard to woman's property which is not stridhana.

2. Stridhana belonging to a woman is property of which she is the absolute owner, and which she may dispose of at her pleasure, if not in all cases during coverture, in all cases

Ss. 124, 125 during widowhood [ss. 141 to 144]. But a woman is *not the absolute owner* of property which is not her stridhana, nor can she dispose of it at her pleasure even during widowhood. She is merely a *qualified* owner of such property in other words she takes only a *limited* interest in the property, the nature and extent of which depend on the character of the property.

The following diagram may perhaps elucidate the subject still further:—



By "woman's property" in the above diagram is meant property acquired by a woman *whatever* may be the source from which it is acquired. Woman's property may be divided into two classes, namely, stridhana and non-stridhana. The distinction between stridhana and non-stridhana has already been noted above. The feature *common* to both stridhana and non-stridhana is that they are both "Woman's property," that is property of which the *ownership* is in the woman, with this difference that her ownership in stridhana is absolute, while in non-stridhana it is *limited*. Thus property acquired by a widow by inheritance from her husband, though it is her property in the sense that she is entitled to its possession and to enjoy the income of it, is not her stridhana. She cannot alienate it except in the special cases mentioned in ss. 178 and 179. But a gift made to a woman by her father constitutes her stridhana and she can sell it, mortgage it, make a gift of it, or dispose of it by will.

III.—ENUMERATION OF STRIDHANA.

125. Sources of woman's property.—A Hindu female may acquire property from diverse sources. The following is a list of the several descriptions of property that may be lawfully acquired by a Hindu female, prepared with special reference to the *source* of acquisition:—

(1) Gifts and bequests from relations [s. 126].

(2) Gifts and bequests from strangers [s. 127].

(3) Property obtained on partition [s. 128].

(4) Property given in lieu of maintenance [s. 129].

(5) Property acquired by inheritance [s. 130].

(6) Property acquired by mechanical arts [s. 131].

(7) Property obtained by compromise [s. 132].

(8) Property acquired by adverse possession [s. 133].

(9) Property purchased with stridhana or with savings of income of stridhana [s. 134].

Ss. 125-127

(10) Property acquired from sources other than those mentioned above [s. 135].

Bequests stand on the same footing as gifts (*v*).

We now proceed to consider which of the above descriptions of property constitute stridhana, and which do not according to the different schools.

126. Gifts and bequests from relations.—Property given or bequeathed (*w*) to a Hindu female, whether during maidenhood, coverture, or widowhood, by her parents and their relations, or by her husband and his relations (*x*), is stridhana according to all the schools, except that the Dayabhaga does not recognize *immoveable property* given or bequeathed by a *husband* to his wife as stridhana (*y*) [s. 120].

Gifts from relations.—Gifts from relations constitute "technical" stridhana [s. 113, sub-s. (*6*)]. Those gifts bear various names according to the occasion on which they are made. Those names are—

(1) *adhyagni*, that is, gifts made before the nuptial fire;

(2) *adhyavahanika*, that is, gifts made at the bridal procession;

(3) *padavandanika*, that is, a gift made to a woman when she makes obeisance at the feet of elders;

(4) *anwadheyaka*, that is, gifts made *after* marriage;

(5) *adhivedanika*, that is, gifts made on supersession;

(6) *sulka*, that is, gratuity or marriage-fee;

(7) *pritidatta*, that is, gifts of affection made by the father-in-law or mother-in-law;

(8) *bhartridatta*, that is, gifts from the husband.

The above terms are explained in sec. 113, sub-secs. (*1*) and (*2*).

See sec. 401, "Gifts and bequests to widows, daughters, and other females."

127. Gifts and bequests from strangers.—A gift may be received by a Hindu female from a stranger, that is, from one who is not a relation, (1) during maidenhood, or (2) at the time of marriage, or (3) during coverture, or (4) during widowhood.

(*v*) *Judoo Nath* v. *Bussunt Coomar* (1873) 19 W. R. 264.

(*w*) (1873) 19 W. R. 264, *supra* (bequest from father); *Damodar* v. *Parmanandas* (1883) 7 Bom. 155 (bequest from husband); *Basanta Kumari* v. *Kamikshya* (1906) 33 Cal. 23, 32 I.A. 181 (bequest from brother); *Atul* v. *Sanyasi* (1905) 32 Cal. 1051 (bequest from son).

(*x*) See *Sambasiva* v. *Venkataswara* (1908) 31 Mad. 179.

(*y*) See Dayabhaga, ch. 4, sec. 1, paras. 18 and 21. See also *Venkata* v. *Venkata* (1877) 1 Mad. 281, 286, 287.

S. 127 (1) Property given or bequeathed to a Hindu female by strangers *during maidenhood* is her stridhana according to all the schools (*z*).

The principal text which excludes gifts from strangers from the category of stridhana is that of *Katyayana*. It runs thus:—

"The wealth which is earned by *mechanical arts*, or which is received through affection *from a stranger*, is *subject to her husband's dominion*. The rest is pronounced to be stridhana."

The words "subject to her *husband's* dominion," in the above text show that the text does *not* apply to acquisitions or gifts from strangers *during maidenhood* or *during widowhood*. The words refer to acquisitions and gifts from strangers *during coverture only* (*z*).

(2) Property given by strangers to a Hindu female *before the nuptial fire* or *at the bridal procession* is stridhana according to all schools. Such property, like property given by relations, constitutes "technical" stridhana [s. 113, sub-sec. (*6*)].

(3) Property given or bequeathed by strangers to a Hindu female *during coverture* is stridhana according to the Bombay, Benares, and Madras (*a*) schools [ss. 116-118], but not according to the Mithila and Dayabhaga schools [ss. 119-120]. But even according to the Dayabhaga, such property becomes her stridhana after her husband's death, as appears from the fact that the Dayabhaga recognizes the ownership of the *wife* in such property even during coverture, though it says it is not her stridhana because it is subject to her husband's control. It is difficult to say whether, according to the Mithila school, such property becomes stridhana after the death of the husband.

Dayabhaga school.—The Dayabhaga first cites the text of Katyayana relating to gifts from strangers and acquisitions by mechanical arts quoted above, and then says: "He (the husband) has a right to take it, even though no distress exists. Hence *though the property is hers*, it does not constitute stridhana because she has no independent power over it:" Dayabhaga, chap. 4, sec. 1, para. 20.

The meaning of the above text is that though the *ownership* of the property is in the wife, it is not her stridhana for, according to the Dayabhaga definition of stridhana, that alone is stridhana which a woman can dispose of *independently* of her husband's consent. On this point Jagannatha says:—

"But according to Jimuta Vahana, Raghunandana, and the rest, *the wife is the sole owner* of wealth acquired by her *even during coverture*; yet she has not independent power over it *so long as her husband lives*. It must therefore be understood, that the legal heirs of stridhana succeed also to this wealth, even if the wife dies in the lifetime of the husband." Colebrooke's Digest, Book V, 515, commentary, Vol. II, p. 628.

(*z*) See Dayabhaga, chap. 4, sec. 1, para. 20 and *Venkata* v. *Venkata* (1877) 1 Mad. 281, 286.

(*a*) *Salemma* v. *Lutchmana* (1898) 21 Mad. 100, a case of service inam enfranchised by Government in favour of a married woman *during* coverture.

Mithila school.—It is difficult to say whether according to the Mithila school a gift from a stranger received during coverture becomes the stridhana of the wife on her husband's death. For it may be that according to that school the ownership of the property passes to the husband immediately the wife receives it, in which case it becomes part of the husband's property, and descends to his heirs on his death. The author was of the opinion that such a gift becomes the stridhana of the woman after her husband's death. The trend of modern decisions is to follow the Mitakshara, unless the special commentaries of the school in question *expressly* declare that a particular kind of property is not stridhana.

(4) Property given (*b*) or bequeathed (*c*) to a Hindu female *during widowhood* is her stridhana. Where a father made a gift of certain properties to his widowed daughter for life with remainder to his heirs, the rents and profits accruing from such properties, including all accumulations thereof are her stridhana, though the corpus is not (*d*).

See notes to sub-section (*1*).

128. Share on partition.—(*1*) According to the Dayabhaga school, where a share is allotted to a mother or father's mother on partition of joint family property, it is given to her by way of provision for her *maintenance* for which the family property is bound. It is not, therefore, her stridhana, and it does not pass on her death to the stridhana heirs, but reverts to the sons or grandsons out of whose portion it was taken out (*e*).

(*2*) Even in cases governed by Mitakshara, the Privy Council have held in *Debi Mangal Prasad* v. *Mahadeo Prasad* (*f*) that a share allotted to a mother on partition is not her stridhana, but stands on the same footing as property inherited by her from her husband (*g*), and that on her death it passes not to her stridhana heirs, but to the sons or grandsons.

(*3*) According to the Mithila school, the share allotted to a woman on partition is not stridhana (*h*). The reason is that it is not one of the eleven kinds of stridhana enumerated in the Vivada Chintamani [sec. 119]

(*b*) *Brij Indar* v. *Janki Koer* (1877) 5 I.A. 1, 1 Cal. L. R. 318 [property acquired *by a widow* under a sannad from Government, which conferred upon her a full proprietary and transferable right in the property, is her stridhana. It was a Mitakshara case, but the Dayabhaga has been freely cited in the judgment of the Privy Council].

(*c*) *Bai Narmada* v. *Bhagwantrai* (1888) 12 Bom. 505.

(*d*) *Mohinee Mohan Basu* v. *Rash Biharee Ghosh* (1937) 2 Cal. 97, 169 I.C. 519, ('37) A.C. 229.

(*e*) *Sorolah* v. *Bhoobun* (1888) 15 Cal. 292; *Hridoy Kant* v. *Behari Lal* (1906) 11 C. W. N. 239; *Hemangini* v. *Kedarnath* (1889) 16 Cal. 758, 16 I.A. 115; *Shashi Bhusan* v. *Hari Narain* (1921) 48 Cal. 1059, 1065, 1066, 66 I.C. 705, ('21) A.C. 202; *Hira Lal Mandal* v. *Sankar Lal Mandal* (1938) 2 Cal. 250.

(*f*) (1912) 34 All. 234, 39 I.A. 121, 14 I.C. 1000, Reversing 32 All. 253, 5 I.C. 208; *Munni Lal* v. *Phula* (1928) 50 All. 22, 105 I.C. 322, ('27) A.A. 679.

(*g*) *Bhagwantrao* v. *Punjaram* (1938) Nag. 255, 174 I.C. 201, ('38) A. N. 1; *Sital Prasad* v. *Sri Ram* (1944) Luck. 450.

(*h*) *Krishna Lal* v. *Nandeshwar* (1919) 4 Pat. L.J. 38, 45, 44 I.C. 146, ('18) A.P. 91 (Share allotted to grandmother).

Ss. 128, 129

(4) As regards the Madras school, the practice of allotting a share to females on partition has become obsolete. No question can, therefore, arise in that school as to whether such share is stridhana or not [sec. 118].

The question whether the share allotted to a mother on partition is stridhana or not according to the Benares school was left open by their Lordships of the Privy Council in *Bhugwandeen* v. *Myna Baee* (i), the very case in which they held that property *inherited* by a woman was not stridhana according to the Mitakshara. In *Debi Mangal Prasad's* case, the Allahabad High Court, after a review of all the authorities on the subject, held that it was stridhana, but the Privy Council held that it stood on the same footing as property *inherited* by a woman and that it was *not* stridhana [sub-sec. (2)].

Where a deed of partition confers in terms an absolute estate upon the mother in the share allotted to her, she takes the share as her stridhana (j). In *Debi Mangal Prasad's* case the Privy Council said: "Of course, the members of a joint, family effecting a partition may agree that a portion of the porperty shall be transferred to the widow by way of absolute gift, as part of her stridhana, so as to constitute a provision for her stridhana heirs; but, in the absence of any such intention, their Lordships do not feel justified in putting property acquired by a widow, on a partition of the joint estate, upon a footing different from that on which property coming to her by way of inheritance has been placed." In a later case, where a share was given by the step-sons to their step-mother and the agreement provided that she was to be responsible for a definite share of the debts, their Lordships of the Privy Council held that the step-mother took an absolute interest in the share alloted to her (k).

129. Property given in lieu of maintenance.—Money paid to a Hindu female periodically for her maintenance (*vritti*), and the arrears of such maintenance, or a lump sum of money given to her in lieu of maintenance, constitute stridhana according to all the schools (l). So too does immoveable property transferred to a woman by way of absolute gift in lieu of maintenance (m). It does not make any difference whether the maintenance is awarded during coverture (n) or during widowhood. Nor does it make any difference that it is awarded under an agreement between the parties or by a decree of the Court (o). The transfer of property given absolutely in lieu of maintenance is not void under sec. 6 of the Transfer of Property Act (p).

Arrears of maintenance constitute stridhana, though the maintenance is payable by the *husband* under a decree obtained by the wife against him. If the wife dies in the

(i) (1876) 11 M. I. A. 487, 514.

(j) *Bolye Chund* v. *Khetterpaul* (1873) 11 Beng. L. R. 459.

(k) *Sahab Rai* b. *Shafiq Ahmad* (1927) 31 C. W. N. 972, 101 I. C. 426, ('27) A. PC. 101.

(l) *Doorga* v. *Teju* (1866) W. R. Mis. 53 (gift of money by son to mother for maintenance); *Court of Wards* v. *Mohessur* (1871) 16 W. R. 76 (Dayabhaga case); *Nellaikumaru* v. *Marakathammal* (1876) 1 Mad. 166; *Subramanian* v. *Arunachelam* (1905) 28 Mad. 1; *Manilal* v. *Bai Rewa* (1893) 17 Bom. 758; *Gunpat Rao* v. *Ram Chunder* (1889) 11 All. 296. See particularly 28 Mad. 1, *supra*, at pp. 7 and 8; *Janardhan* v. *Sonalai* (1942) Nag. 16, 198 I.C. 293, ('42) A.N. 30.

(m) *DebiMangal Prasad* v. *Mahadeo Prasad* (1912) 34 All. 234, 39 I.A. 121, 131, 14 I.C. 1000.

(n) (1893) 17 Bom. 758, *supra*.

(o) (1893) 17 Bom. 758, and (1905) 28 Mad. 1, *supra*.

(p) *Dhul Nath* v. *Ram Charitra* (1932) 54 All. 366, 138 I.C. 556; ('32) A.A. 366.

lifetime of the husband, such stridhana passes to her stridhana heirs, so that if she has a daughter, she will inherit it and she can claim it from the woman's husband, even if he happens to be her own father.

The text generally cited in this connection is that of the Smriti writer Devala, which runs as follows :—

" Her *subsistence*, her ornaments, her perquisite (*sulka*), and her gains are the separate property of a woman."

It may be asked why, if the *share* allotted to a woman on partition is not her stridhana, maintenance allotted to her is her stridhana. The answer is that the share allotted to a mother on *partition* is always equal to that of the son's share which *may* exceed what is required for her actual maintenance, while maintenance is not fixed on that basis.

As to the law of the Mithila school, see sec. 119.

130. Property acquired by inheritance.—(*1*) A woman may inherit the ordinary property of a male such as her husband, father, son and the rest. She may also inherit the stridhana of a female such as her mother, daughter, and the rest.

(*2*) According to the Dayabhaga school, as well as the Benares, Mithila, and Madras schools, property inherited by a woman whether from a male or from a female, does not become her stridhana. She takes only a *limited* interest in the property [secs. 177-180], and on her death the property passes not to her heirs, but to the next heir of the person from whom she inherited it [secs. 168-169]. Thus if the property is inherited from a male, it will pass to his sapindas, sakulyas and samanodakas, if the parties are governed by the Dayabhaga law [secs. 88-90], and to his sapindas, samanodakas and bandhus if the parties are governed by the Mitakshara law [secs. 43 to 50]. And if the property is inherited from a female, it will pass to the next stridhana heirs of such female [secs. 145-157].

Illustration.

A Hindu dies leaving a widow and a brother. The widow will inherit his property as his heir. She takes only a *limited* interest in the property, that is, she can enjoy only the income of the property. She cannot alienate the property except in the cases mentioned in secs. 178-179. On her death, the property will pass not to her stridhana heirs, but to the next heir of her husband, that is, his brother. The same rule applies where a female inherits property from her father, son, son's son, or son's son's son, that is, where she inherits it as daughter, mother, grandmother, or great-grandmother respectively. As to property inherited *from a female* see the illustration to sec. 169 below.

(*3*) According to the Bombay school, property inherited by a woman *from a female* becomes her stridhana in all cases. She can dispose of it by act *inter vivos* [that is, by sale,

S. 130 mortgage, gift, etc.] or by will, and on her death intestate the property passes to her stridhana heirs (sec. 171).

As regards property inherited by a female *from a male*, the Bombay school divides female heirs into two classes, namely—

(a) those who are introduced into the *gotra* or family of the deceased owner by marriage, such as the deceased's wife, mother, father's mother, etc.; and

(b) other female heirs, being females born in the family, such as the daughter, sister, brother's daughter, sister's daughter, etc.

Property inherited by a female who belongs to class (a) does not become her stridhana. She takes only a limited interest in such property, and on her death it passes to the next heir of the male from whom she inherited it.

Property inherited by a female who belongs to class (b) becomes her stridhana in all cases. She can dispose of it by an act *inter vivos* or by will, and on her death it passes to her own stridhana heirs (sec. 170).

(*4*) The result is, as regards property acquired by inheritance, that according to the Dayabhaga, Benares, Mithila, and Madras schools, it does not become stridhana in any case, while according to the Bombay school, it becomes stridhana in all cases except where it is inherited by the deceased's widow, mother, or other female relation who entered his *gotra* (family) by marriage.

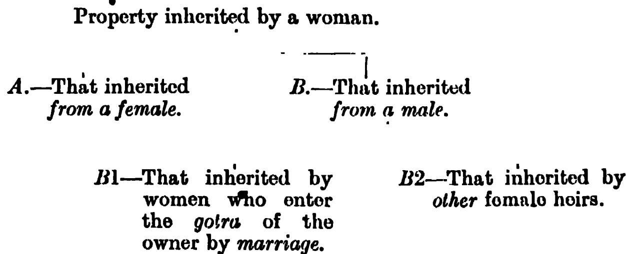
The illustrations to secs. 170 and 171 may be read.

Females who enter the gotra of a Hindu by marriage.—These are his wife, his father's wife (*i.e.*, his mother), his father's father's wife (*i.e.*, his grandmother), his father's father's father's wife (*i.e.*, his great-grandmother), and the wives of *other ascendants ;* also the wives of *collaterals*, a class of heirs recognized in the Bombay school only, namely his brother's wife, his nephew's wife, his uncle's wife, his cousin's wife, etc. [sec. 68]. In short the females who enter the *gotra* of a Hindu by *marriage* are his own wife, and the wives of all his sapindas and samanodakas. All these take a limited interest in the property inherited by them from a male sapinda or samanodaka, and on their death the property passes not to their stridhana heirs, for it is not their stridhana but to the next heir of the male from whom they inherit it.

Females born in the family.—Turning now to the other female heirs in the Bombay Presidency, that is, females other than those who enter the *gotra* of a person by marriage, it will be seen that they are either females *born* in his gotra or the daughters of such females. Thus a daughter, sister (father's daughter), niece (brother's daughter), are "daughters *born* in the *gotra*"; while a daughter's daughter, sister's daughter, etc., are

the daughters of "daughters born in the *gotra*". Property inherited by these female heirs from any male member of the *gotra* in which they are born, becomes their stridhana. Thus a daughter inheriting to a father, a sister inheriting to a brother, a niece inheriting to an uncle, all take the property absolutely as their stridhana. They can dispose of it in any way they like and on their death it passes to their own stridhana heirs. **Ss. 130,131**

What is stated above may be explained by a diagram thus :—



According to the Bombay school, *A* and *B2* are stridhana; *B1* is not stridhana. According to the other schools no inherited property can be stridhana at all.

131. Property acquired by mechanical arts.—A Hindu female may acquire property by mechanical arts or otherwise by her own exertions during maidenhood, or she may do so during coverture, or during widowhood.

(1) Property acquired by a Hindu female by mechanical arts or otherwise by her own exertions during maidenhood or widowhood is stridhana according to all the schools. The reason is, that the text of Katyayana which excludes such property from the category of stridhana applies only to property acquired during coverture [sec. 127, sub-sec. (*1*), notes].

(2) Property acquired by a Hindu female by mechanical arts or otherwise by her own exertions during coverture is stridhana according to the Bombay, Benares, and Madras (*q*) schools [ss. 116-118], but not according to the Mithila and Dayabhaga schools [ss. 119-120]. But if the woman survives her husband, then, it seems that according to the Dayabhaga law such property becomes her stridhana, for the Dayabhaga distinctly recognizes the *wife's* ownership in the property even during coverture. It is difficult to say whether it becomes stridhana according to the Mithila law.

The notes to sec. 127, sub-secs. (*1*) and (*3*) may be read. Mechanical arts include spinning, painting, etc.

(*q*) See *Salemma* v. *Lutchmana* (1898) 21 Mad. 100, at p. 105; *Muthu Ramakrishna* v. *Marimuthu* (1915) 38 Mad. 1036, 24 I.C. 363, ('14) A.M. 128 [property acquired by husband and wife by joint trade].

Ss. 132-134

132. Property obtained by compromise.—As to properties obtained by a woman under a compromise or a family arrangement, there is no presumption that she takes only a life estate. What estate she takes depends on the terms of the deed and other circumstances (*r*). Accordingly where one of two brothers living jointly died and his share was claimed by right of survivorship by the other brother, while the widow claimed it as his heir and the matter was referred to arbitration and under the award certain property was allotted to her, it was held by the Privy Council that she took an absolute estate in the property allotted to her on the ground that there were no words in the award to narrow her interst (*s*). Property obtained by a woman under a compromise in consideration of her giving up her rights in relation to her stridhana is stridhana according to all the schools (*t*). Property obtained by a widow under a compromise with her adopted son, is her absolute property (*u*). Where a daughter, not an heir by custom, obtains property from a reversioner by a compromise, it is her stridhana (*v*).

133. Property obtained by adverse possession.—Property acquired by a Hindu female, whether during coverture (*w*) or widowhood (*x*), by adverse possession, becomes her stridhana according to all the schools. See sec. 211 below.

A Hindu female executes a deed of gift of her *stridhana* in favour of her daughter, but the deed is not registered. The daughter enters into possession of the property. In such a case if the mother dies after the daughter's possession has become adverse, the daughter is entitled to the property *as her stridhana*, the same having been acquired by adverse possession, and on her death it will pass to her heirs. But if the mother dies before twelve years' adverse possession has been completed leaving the daughter as her heir, and the daughter continues in possession, her possession after her mother's death is the possession of an *heir*, and she takes a *limited* interest in it, and at her death the property will pass not to her heirs, but to the next stridhana heirs of the mother (*y*). See sec. 169.

134. Property purchased with stridhana.—Property purchased by a woman with her stridhana, and the savings of the income of stridhana, constitute stridhana according to all the schools (*z*).

(*r*) *Pandit Adya Shankar Tewari* v. *Mt. Chandravati* (1935) 10 Luck. 35, 150 I. C. 519, ('34) A.O. 265.

(*s*) *Nathulal* v. *Baburam* (1936) 63 I.A. 155, 38 Bom. L. R. 462, 151 I. C. 33, ('36) A. PC. 103.

(*t*) *Sowdaminee Dossee* v. *Administrator-General of Bengal* (1893) 20 Cal. 433, 438-439, 443, 20 I. A. 12. See also *Sambasiva* v. *Venkataswara* (1908) 31 Mad. 179.

(*u*) *Parshottam* v. *Keshavlal* (1932) 56 Bom. 164, 137 I.C. 561, ('32) A.B. 213.

(*v*) *Rai Rajeshwar* v. *Harkishan* (1933) 8 Luck. 538, 150 I. C. 346, ('38) A.O. 170.

(*w*) *Mohim Chunder* v. *Kashi Kant* (1897) 2 W. N. 161, 162.

(*x*) *Sham Koer* v. *Dah Koer* (1902) 29 Cal. 664, 29 I.A. 132; *Kanhai Ram* v. *Amri* (1910) 32 All. 189, 5 I.C. 207; *Mohim Chunder* v. *Kashi Kant* (1897) 2 C. W. N. 161.

(*y*) *Dhurjati* v. *Ram Bharos* (1930) 52 All 222, 121 I.C. 701, ('30) A.A. 109.

(*z*) *Luchmun* v. *Kalli Churn* (1873) 19 W. R. 292 [P.C.]; *Venkata* v. *Venkata* (1880) 2 Mad. 333 [P.C.], affirming *Venkata* v. *Venkata* (1877) 1 Mad. 281; *Nellaikumaru* v. *Marakathammal* (1876) 1 Mad. 166; *Subramanian* v. *Arunachelam* (1905) 28 Mad. 1.

It does not make any difference that the property purchased is *immoveable* property [s. 177]. Nor does it make any difference that it was purchased by her in the exercise of a right of pre-emption, though she could not have claimed the right had she not been in possession of her husband's property which adjoined the property purchased by her. If it was purchased with her stridhana, it is her property (*a*). The mere fact that she could not have acquired the property had she not been in possession of her husband's estate does not make it part of her husband's estate (*b*). Where the main estate was in the hands of a receiver appointed under a decree and the widow was only receiving a pension, purchases of properties made by the widow out of her savings would be her stridhana and would pass to her stridhana heirs (*c*).

If a woman obtains property *in exchange for* property which is her stridhana or advances money which forms her stridhana on a mortgage, or takes an assignment of leasehold property with her stridhana, all such property constitutes her stridhana.

135. Property acquired from other sources.—We have enumerated in sections 126 to 134 the principal sources from which property may be acquired by a Hindu female. Whether property acquired by her from any other source constitutes her stridhana or not, is to be determined with reference to the provisions of sec. 123 above.

We have already stated in sec. 124 that stridhana has two peculiarities attaching to it, namely, (1) that the woman has absolute power of disposal over it except in certain cases during coverture, and (2) that it follows a special order of succession. We shall deal with the first of these in secs. 141 to 144, and with the second in secs. 145 to 164. In fact, the question whether a particular kind of property is stridhana or not becomes important only when the question arises as to her *power to dispose of it* or as to the *line of succession* thereto.

136. Stridhana by custom.—The widow of a separated Hindu who dies without leaving male issue may, by custom, inherit his estate as stridhana (*d*).

In the case referred to above the parties were Jains governed by the Mitakshara law.

137. Maiden's property.—It is clear from what has been stated in the foregoing sections that except property inherited by her all property of a maiden, however acquired, whether by way of gift or bequest from relations or from strangers, or by mechanical arts or otherwise by her own exertions, constitutes her stridhana. But in the Bombay school, even property inherited by her is her stridhana, for a maiden does not come within the category of females who enter the *gotra* of the owner *by marriage* [sec. 130, sub-sec. (4)].

See notes to sec. 127, sub-sec. (*1*).

The word *rikhta* (property) is perhaps more appropriate to be applied to the property of a maiden than the word *stridhana*.

(*a*) *Sri Ram* v. *Jagdamba* (1921) 43 All. 374, 61 I. C. 3, ('21) A.A. 11 [F.B.].

(*b*) *Mahna Singh* v. *Thaman Singh* (1931) 11 Lah. 393, 128 I.C. 293, ('30) A.L. 1010.

(*c*) *Aiswaryanandaj* v. *Sivaji* (1935) 49 Mad. 116 ('26) A.M. 81.

(*d*) *Hukum Chand* v. *Sital Prasad* (1928) 50 All. 232, 107 I.C. 244, ('28) A.A. 52.

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138. Property acquired during widowhood.—It follows from what has been stated in the preceding sections, that all property of a widow acquired by her during her widowhood (whether by way of gift or bequest from relations or from strangers, or by mechanical arts, or by way of maintenance, or by adverse possession, or under a compromise), constitutes her stridhana except—

(i) according to the Bombay school, property inherited by her as a widow, mother, grandmother, etc.; and, according to other schools, *all* property inherited by her in any capacity [sec. 130]; and

(ii) property obtained by her on partition [sec. 128].

See sec. 127 and notes thereto, and also secs. 129, 131, 132 and 133.

139. Unchastity.—Unchastity does not disqualify a woman from inheriting stridhana property (*e*).

140. Presumption as to property found in widow's possession.—Where a widow is found in possession of property of the acquisition of which no account is given, then the mere fact that her husband died possessed of considerable property raises no presumption that the property found in her possession was originally that of her husband (*f*). Nor is there any presumption that the money with which a widow in possession of her husband's estate makes a purchase of property came out of the savings from her husband's estate (*g*). Generally where a woman has been in possession of property, there is no presumption that she had only a limited estate in it (*h*).

IV. RIGHTS OF A WOMAN OVER HER STRIDHANA.

141. Texts bearing on the subject.—The whole law relating to the rights of women over their stridhana has been evolved from the following four texts, of which the first three are the texts of Katyayana, and the last is the text of Narada :—

(1) "What a woman, either after marriage or before it, either in the mansion of her husband or of her father, *receives from her lord or her parents* is called *saudayika*, that is, a gift

(*e*) *Mst. Ganga* v. *Ghasita* (1875) 1 All. 46; *Nogendra* v. *Benoy Krishna* (1903) 30 Cal. 521; *Angammal* v. *Venkata* (1903) 26 Mad. 509.

(*f*) *Diwan Ram Bijai* v. *Indarpal* (1899) 26 Cal. 871, 26 I.A. 226; *Ganpat* v. *Secretary of State* (1921) 45 Bom. 1106, 62 I.C. 109, ('21) A. B. 138; *Narayana* v. *Krishna* (1885) 8 Mad. 214; *Chowdrani* v. *Tariny Kanth* (1882) 8 Cal. 545.

(*g*) *Baikunth Nath* v. *Jai Kishun* (1929) 51 All. 341, 113 I.C. 266, ('20) A.A. 449.

(*h*) *Belo* v. *Parbati* (1940) All. 371, 190 I.C. 634, ('40) A.A. 385.

from affectionate kindred; and such a gift having by them been presented through kindness, that the woman possessing it may live well, is declared by law to be her absolute property. *The absolute exclusive dominion of women over such a gift* is perpetually celebrated; and they have *power to sell or give it away as they please,* even though it consists of lands and houses. Neither the husband, nor the son, nor the father, nor the brother, has power to use or to alienate the legal property of a woman."—*Katyayana* [Colebrooke's Digest, Book V, p. 475]. **S. 141**

(2) "The wealth which is earned *by mechanical arts* or which is received through affection *from a stranger* is *subject* to her husband's dominion."- *Katyayana* [cited in the Dayabhaga, chap. 4, sec. 1, para. 19].

(3) "What a woman has received as a *gift from her husband* she may dispose of at pleasure *after his death,* if it be *moveable*; but as long as he lives, let her preserve it with frugality or she may commit it to his family."—*Katyayana* [Colebrooke's Digest, Book V, p. 477].

(4) "Property *given to her by her husband* through pure affection she may enjoy at her pleasure *after his death,* or may give it away *except land or houses.*"—*Narada* [Colebrooke's Digest, Book V, p. 476].

It follows from the above texts—

(i) that *during maidenhood,* a Hindu female can dispose of her stridhana of every description at her pleasure;

(ii) that *during coverture,* she can dispose of only that kind of stridhana which is called *saudayika,* that is, gifts from relations except those made by the husband;

(iii) that *during widowhood,* she can dispose of her stridhana of every description at her pleasure including moveable property given by the husband, but not immoveable property given by him.

When we turn to judicial decisions on the subject, we find that the distinction between *saudayika,* that is gifts from *relations,* and *non-saudayika* is still maintained, but the distinction between *saudayika* given by the husband and that

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given by other relations no longer stands. Instead we have now a simple rule for all kinds of *saudayika* based upon the distinction between an absolute grant and a limited grant. In order to determine whether *saudayika*, that is property given to a female by her *relations*, can be disposed of by her at her pleasure, the rule now adopted by our Courts is to ascertain whether the gift passes an absolute estate or a limited estate. If the gift passes an absolute estate, she can dispose of the property at her pleasure *whether the gift be from her husband or other relations*. But if the gift passes a limited estate only in the property, *e.g.*, a life-estate, she cannot alienate the property though she may alienate her life-estate. Thus if *A* gives property to his daughter for life, and the remainder to his nephew on the death of his daughter, the daughter takes only a life-estate. She cannot therefore alienate the *corpus* of the property, though she may alienate her life interest. We now proceed to state the rules on the subject, so far as they are settled by judicial decisions.

142. Rights over stridhana during maidenhood.—There is no limitation to the power of a Hindu female to dispose of her stridhana during maidenhood, whatever be the character of the stridhana, qualification attaching except the disqualification to her by reason of minority.

So long as a Hindu maiden is a minor, she cannot alienate her property except through her guardian, nor can she dispose of it by will.

Note that the texts cited in sec. 141 refer only to the case of a *married* woman.

143. Rights over stridhana during coverture—Saudayika and non-saudayika.—The power of a woman to dispose of her stridhana during coverture depends on the character of the stridhana. For this purpose stridhana is divided into two classes, namely, (1) *saudayika*, and (2) other kinds of stridhana. *Saudayika* means, literally, a gift made through affection. It is a term applied to gifts made to a woman at, before, or after marriage, by her parents and their relations, or by her husband and his relations; in other words it means gifts from *relations* as distinguished from gifts from *strangers* (*i*). It also includes *bequests* from relations (*j*).

(*i*) *Muthukaruppa* v. *Sellathammal* (1916) 39 Mad. 298, 26 I.C. 785, ('15) A.M. 475; *Bhau* v. *Raghunath* (1906) 30 Bom. 229.

(*j*) *Damodar* v. *Purmanandas* (1883) 7 Bom. 155 [bequest from husband]; *Judoonath* v. *Bussunt Coomar* (1873) 11 Beng. L.R. 286, 295 [bequest from father].

(1) *Saudayika alienable at pleasure.*—A woman has absolute power of disposal over her *saudayika* stridhana even during coverture. She may dispose of it by sale, gift, will, or in any other way she pleases, without the consent of her husband (*k*). Her husband has no control over it. He cannot bind her by any dealings with it (*l*). But he can "take" it in case of distress, as in a famine, or during illness or imprisonment. This right to take the wife's property is personal to him, and if he does not choose to take it, it cannot be taken by his creditors in execution of a decree against him (*m*). The word "take" in the text of Yajnavalkya does not mean "physical taking," but means "taking and using." Hence if the husband takes his wife's property in circumstances such as the above, but does not actually use it or dispose of it in his lifetime, his creditors are not entitled to it after his death (*n*). S. 143

(2) *Stridhana other than saudayika.*—*Saudayika* stridhana, we have seen, can be disposed of by a woman at her pleasure and without the consent of her husband. As regards stridhana other than *saudayika*, *e.g.*, gifts from strangers, property acquired by mechanical arts, etc., the rule is that she has no power to dispose of it during coverture without the consent of her husband (*o*). It is subject to her husband's dominion, and he is entitled to use it at his pleasure even if there be no distress. In a case where, though the wife was not living with the husband for 20 or 25 years, she was living in a separate room in a temple and the husband lived in the same temple it was held that she was under coverture and the rule was applied. (*p*). But it is subject only to her husband's control and not to the control of any other person. After the husband's death, her power to dispose of it becomes absolute, and she may dispose of it by act *inter vivos* or by will.

(*k*) *Venkata* v. *Venkata* (1880) 2 Mad. 333 [P.C.] [affirming *Venkata* v. *Venkata* (1877) 1 Mad. 281] [gifts of moveables from husband]; *Munia* v. *Puran* (1883) 5 All. 310 [immoveable property acquired from brother]; *Bhau* v. *Raghunath* (1906) 30 Bom. 229; *Sham Shivendar* v. *Janki Koer* (1909) 36 Cal. 311, 36 I. A. 1, 1 I.C. 126; *King-Emperor* v. *Satnarain* (1931) 53 All. 437, 130 I.C. 693, ('31) A.A. 265; *Venkareddi* v. *Hanmant Gowda* (1933) 57 Bom. 85, 141 I.C. 682, ('32) A.B. 550.

(*l*) *Mohini Chunder* v. *Durga Monee* (1875) 23 W.R. 184 [P.C.].

(*m*) *Tukaram* v. *Gunaji* (1871) 8 Bom. H.C. A.C. 129.

(*n*) *Nammalwar* v. *Thayarammal* (1927) 50 Mad. 941, 105 I.C. 793, ('27) A.M. 1031.

(*o*) *Bhau* v. *Raghunath* (1906) 30 Bom. 229. See *Salemma* v. *Lutchmana* (1898) 21 Mad. 100, 105.

(*p*) *Sarubhai Balakdas* v. *Narayandas Bairagi* (1943) Bom. 314, 209 I.C. 620, ('43) A.B. 224.

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When it is said that stridhana other than *saudayika* (gifts from relations) cannot be disposed of by a woman without her husband's consent, it is meant that *in her lifetime* she cannot sell it, or make a gift of it, or bequeath it by her will, or otherwise deal with it without her husband's consent. *On her death* whether she dies before (*q*) or after her husband, it passes to her stridhana heirs.

144. Rights over stridhana during widowhood.—A Hindu female has during widowhood absolute power of disposal over every kind of stridhana whether acquired before or after her husband's death (*r*).

V.—SUCCESSION TO STRIDHANA.

145. Succession to maiden's property.—(*1*) Succession to a woman's stridhana varies according as she was married or unmarried, and according as she was married in an approved or in an unapproved form. It also varies according to the source from which the stridhana came. The rules of descent, again, are different in different schools. But the schools do not differ as to succession to the property of a maiden. A maiden's property, according to all the schools, passes in the following order :—

(1) uterine brother ;

(2) mother ;

(3) father ;

(4) father's heirs in order of propinquity (*s*) ; *e.g.*, the full sisters of maiden's father were preferred to the half sisters (*t*).

(5) kinsmen of the deceased herself, that is, her mother's heirs in order of propinquity (*s*).

(*2*) *Death of girl after betrothal and presents received from bridegroom.*—Where a girl dies after betrothal, all presents received from the bridegroom are to be returned to him, after deducting all expenses incurred by the bride or her parent or guardian.

(*q*) *Salema* v. *Lutchmana* (1898) 21 Mad. 100; Banerjee's "Hindu Law of Marriage and Stridhana," 5th ed., pp. 382-383 [as to gifts from strangers and property acquired by mechanical arts].

(*r*) *Brij Indar* v. *Janki Koer* (1877) 1 Cal. L. R. 318, 325, 5 I.A. 1, 15; *Venkata* v. *Venkata* (1877) 1 Mad. 281, 286.

(*s*) *Janglubai* v. *Jetha* (1908) 32 Bom. 409, 413; *Shama Rao* v. *Raghunandan* (1939) Bom. 228, ('37) A.B. 194.

(*t*) *Shakuntalabai* v. *The Court of Wards* (1942) Nag. 629, 199 I.C. 379, ('42) A.N. 57, 14 I.R. 273.

The order of succession down to no. 3 (father) is based upon a text of Baudhyayana which is followed by all the schools. The line of descent is not carried any further in that text. The Viramitrodaya of the Benares school, after citing the said text, adds: "On failure of the mother and the father, it goes to *their nearest relations.*" This has been interpreted by the High Court of Bombay to mean that it goes, first, to the father's sapindas, and then to the kinsmen of the deceased herself, that is, to the mother's sapindas. Thus where a maiden died leaving her *father's* mother's sister and her *mother's* mother, it was held by the High Court of Bombay that the former being a sapinda of the father, was entitled to succeed in preference to the latter who was a sapinda of the mother (*u*). It has similarly been held by the High Court of Madras that a step-mother (*father's* wife) is entitled to succeed in preference to a *mother's* sister (*v*).

Father's heirs in order of propinquity.—In the Bombay Presidency a father's *sister* is entitled to succeed to a maiden's stridhana in preference to the father's male gotraja sapindas five or six degrees removed (*w*); see sec. 72, no. 12 and sec. 77, no. 12. But in Madras a sister is a bandhu [sec. 55, no. 1]; hence in that Presidency, the father's male gotraja sapindas, *e.g.*, his paternal uncle's son, would be preferred to his sister (*x*).

Under the Mitakshara law as applied by the High Court of Calcutta, a sister (father's daughter) and a sister's son (father's daughter's son) are entitled to succeed to a maiden's stridhana in preference to a father's brother's son (*y*).

We next proceed to state the rules of succession to the stridhana of a *married woman,* first according to the Mitakshara, next according to the four Mitakshara sub-schools, and lastly, according to the Dayabhaga. But before doing so, we shall state the order of succession to *Sulka,* as it is the same in all the four Mitakshara sub-schools.

146. Succession to sulka.—(*1*) The term *sulka* is differently interpreted in different schools [see secs. 147, 150, 152, 153 & 154]. According to the Benares, Bombay, Madras and Mithila schools, *sulka* passes in the following order :—

1. uterine brother ;
2. mother ;

in default of these, it is conceived that it passes to—

3. father ;
4. father's heirs, that is, his sapindas, samanodakas and bandhus.

(*2*) According to the Dayabhaga, *sulka* passes in the following order :—

1. whole brother ;
2. mother ;
3. father ;
4. husband.

(*u*) (1908) 32 Bom. 409, *supra.*

(*v*) *Kamala* v. *Bhagirathi* (1915) 38 Mad. 45, 16 I.C. 939, ('16) A.M. 925.

(*w*) *Tukaram* v. *Narayan* (1912) 36 Bom. 339, 14 I.C. 438 [F.B.].

(*x*) *Sundaram* v. *Ramasamia* (1920) 43 Mad. 32, 52 I.C. 821, ('20) A.M. 728.

(*y*) *Dwarka Nath* v. *Sarat Chandra* (1912) 39 Cal. 319, 11 I.C. 872.

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The leading text on succession to *Sulka* is that of Gautama, which runs as follows:—"The sister's fee belongs to the uterine brothers; after [the death of] the mother." The text may also be translated thus: "The sister's fee belongs to the uterine brothers; after [them] it goes to the mother." And this is the translation accepted by all the schools.

A.—SUCCESSION TO STRIDHANA ACCORDING TO THE MITAKSHARA.

147. Succession to stridhana according to the Mitakshara.—For the purposes of succession, the Mitakshara divides stridhana [s. 115] into two classes, namely—

(1) *sulka*, which is defined as a gratuity for which a girl is given in marriage; and

(2) other kinds of stridhana.

(*1*) *Sulka.*—*Sulka* devolves in the order mentioned in s. 146, sub-s. (*1*).

(*2*) *Other kinds of stridhana.*—Stridhana other than *sulka* passes in the following order:—

1. unmarried daughter;

She takes before married daughter. The rule applies to Jains in the absence of a special custom (*z*).

2. married daughter who is unprovided for (*a*);
3. married daughter who is provided for (*b*);
4. daughter's daughter (*c*);
5. daughter's son (*c*);
6. son (*d*);
7. son's son (*e*).

If there be none of these, in other words, if the woman dies without leaving any issue, her stridhana, if she was married in an approved form (*f*), goes to her husband (*g*), and, after him, to the husband's heirs in order of their succession to him (*h*)

(*z*) *Jaiwanti* v. *Anandi Devi* (1938) All. 196, 173 I.C. 356, ('38) A. A. 62.

(*a*) *Srimati Uma Devi* v. *Gokoolanund* (1878) 3 Cal. 587, 5 I.A. 40.

(*b*) See *Totawa* v. *Basawa* (1899) 23 Bom. 229.

(*c*) *Matru Mal* v. *Meheri Kunwar* (1940) All. 416, 189 I.C. 600, ('40) A.A. 311; *Subramanian* v. *Arunachelam* (1905) 28 Mad. 1 [daughter's daughter takes before daughter's son]; *Amarjit* v. *Algu* (1929) 51 All. 478, 113 I.C. 765, ('29) A.A. 71.

(*d*) *Karuppai* v. *Sankaranarayanan* (1904) 27 Mad. 300 [two or more sons take as tenants in common].

(*e*) *Sham Bihari Lal* v. *Ram Kali* (1923) 45 All. 715, 75 I.C. 495, ('24) A.A. 15 [daughter's daughter is a nearer heir than son's son]; *Ram Kali* v. *Gopal Dei* (1926) 48 All. 648, 96 I. C. 757, ('26) A.A. 557 [ditto]; *Hukum Chand* v. *Sital Prasad* (1928) 50 All. 232, 107 I.C. 244, ('28) A.A. 52 [ditto].

(*f*) *Gurdial* v. *Bhagwan Devi* (1927) 8 Lah. 366, 101 I. C. 850, ('27) A. L. 441.

(*g*) *Bhimacharya* v. *Ramacharya* (1909) 33 Bom. 452, 3 I. C. 750 [husband takes before his son by another wife].

(*h*) *Bai Kesserbai* v. *Hunsraj* (1906) 30 Bom. 431, 451, 33 I.A. 176; *Javitri* v. *Gendan Singh* (1927) 49 All. 779, 102 I. C. 167, ('27) A.A. 767; *Jodha* v. *Darbari Lal* (1927) 2 Luck. 612, 104 I. C. 193, ('27) A. O. 339; *Srimati Krishna* v. *Bhaiya Rajendra* (1927) 2 Luck. 43, 89-90, 104 I. C. 155, ('27) A. O. 240.

[see note (1) below]; on failure of the husband's heirs, it goes to her blood relations in preference to the Crown (*i*). But if she was married in an unapproved form (*j*) it goes to her mother, then to her father, and then to the father's heirs (*k*) [see note (2)], and then to the husband's heirs in preference to the Crown (*l*). **S. 147**

Inherited property.—Property inherited by a female can be stridhana only in the Bombay school, and that too in the cases specified in section 130, sub-section (*3*). How does this kind of stridhana devolve in Bombay? The answer is that if the case is governed by the Mitakshara, it devolves in the order given in sub-section (*2*) above, and if it is governed by the Mayukha, it devolves in the order given in section 151, clause II. See sections 170-171.

1. *Husband and his heirs.*—Where the marriage is in an approved form, the stridhana goes, in default of issue, to the husband and his heirs, that is to say, it descends in the same way *as if it had belonged to the husband himself.* The husband's heirs are not enumerated in the Mitakshara. They may, however, be ascertained from sec. 43 above. Following the lines of the order there given, the successive heirs to a woman's stridhana, after the husband would be—

1. his (husband's) son by another wife (*m*), *i.e.*, the deceased woman's step-son;

Note.—The illegitimate son is not entitled to succeed to the stridhana of his father's wife (*n*).

2. his grandson by another wife (*o*);
3. his great-grandson by another wife;
4. his other wives (*p*);
5. his daughter by another wife, *i.e.*, the deceased woman's step-daughter (*q*);
6. the son of his daughter by another wife, that is, step-daughter's son;
7. his mother; } but in cases governed by the Mayukha { 7. father;
8. his father; } { 8. mother;
9. his brother (*r*); but in cases governed by the Mayukha, the full brother succeeds along with sons of full brothers who are dead, see sec. 77 and notes to No. 9 at p. 87 above.
10. his brother's son;

then his other sapindas, then his samanodakas, and then his bandhus (*s*).

(*i*) *Kanakammal* v. *Ananthamathi* (1914) 37 Mad. 293, 25 I. C. 901, ('15) A.M. 18; *Ganpat* v. *Secretary of State* (1921) 45 Bom. 1106, 62 I. C. 109, ('21) A. B. 138.

(*j*) *Janglubai* v. *Jetha* (1908) 32 Bom. 409, 412, 413.

(*k*) *Raju* v. *Ammani* (1906) 29 Mad. 358 (sister as *father's* daughter takes before sister's son); *Chunilal* v. *Surajram* (1909) 33 Bom. 433, 3 I. C. 765; *Govind* v. *Savitri* (1919) 43 Bom. 173, 47 I. C. 883, ('18) A.B. 93 [sister before paternal uncle].

(*l*) *Chandulal Asharam* v. *Bai Kashi* (1939) Bom. 97.

(*m*) (1909) 33 Bom. 452, 3 I. C. 750, *supra* (step-son takes after the husband).

(*n*) *Ayiswaryanandaji* v. *Sivaji* (1926) 49 Mad. 116, 92 I.C. 928, ('26) A.M. 84.

(*o*) *Gojabai* v. *Shrimant Shahajirao* (1893) 17 Bom. 114.

(*p*) *Krishnai* v. *Shripati* (1906) 30 Bom. 333, affirming co-widow's right to succeed; *Kesserbai* v. *Hunsraj* (1906) 30 Bom. 431, 33 I. A. 176 (co-widow takes before husband's brother and his nephew).

(*q*) *Nanjia* v. *Sivabagyathachi* (1913) 36 Mad. 116, 12 I. C. 128 [co-wife's daughter before father's brother's son].

(*r*) *Parmappa* v. *Shiddappa* (1906) 30 Bom. 607 (full brother takes before half-brother). See note (*p*) above.

(*s*) *Ganeshi Lal* v. *Ajudhia Prasad* (1906) 28 All. 345 (husband's sister's son takes before the deceased woman's sister's son).

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According to the Bombay school, the widow of gotraja sapindas would also be heirs [s. 68].

2. *Father and his heirs.*—When the marriage is in an unapproved form, the stridhana goes, in default of issue, not to the *husband* and his heirs, but to the mother, father, and the *father's heirs*, as in the case of stridhana belonging to a maiden [s. 145]. The reason is that a woman married in an unapproved form is deemed to continue to belong to her *father's* family, because in such a marriage there is *no giving away* of the bride by the father to the bridegroom (*t*). The successive heirs after the father would be the deceased woman's brother, brother's son, step-mother (*u*), sister, sister's son, grand-mother, paternal uncle, and her father's other sapindas, samanodakas and bandhus.

3. *Presumption as to form of marriage.*—When the question arises as to whether a marriage was in an approved or in an unapproved form, the presumption is that it was in an approved form, unless the contrary is proved (*v*).

4. *Preference of female issue to male issue.*—As regards succession to stridhana it should be noted that according to the Mitakshara it goes to the female issue of the deceased woman in preference to the *male* issue; see sub-sec. (2).

5. *Issue born of a woman by adulterous intercourse.*—It has been seen that where a woman dies leaving a husband and a son, the son is entitled to succeed to her stridhana in preference to the husband. The reason is that the *issue* of a woman is entitled to succeed to her stridhana before the husband. But *issue* means issue born in lawful wedlock. Therefore, if a woman dies leaving a husband and a son born of her by adulterous intercourse the husband is entitled to succeed to her stridhana in preference to the son (*w*). See sec. 163.

6. *Married and unmarried daughter's daughter.*—There is no distinction between married and unmarried daughter's daughters as there is in the case of daughters (*x*).

B.—SUCCESSION TO STRIDHANA—BENARES SCHOOL.

148. Succession to stridhana—Benares school.—Succession to stridhana according to the Benares school is governed entirely by the law as expounded in the Mitakshara and set forth in sec. 147 above.

C.—SUCCESSION TO STRIDHANA—BOMBAY SCHOOL.

149. Succession to stridhana—Bombay school.—The Mayukha is of paramount authority in the island of Bombay, Gujarat and the Northern Konkan. In other parts of Bombay Presidency the authority of the Mitakshara is supreme [s. 12]. The result is that in cases governed by the Mitakshara succession to stridhana is governed by the rules laid down in the Mitakshara [s. 147], while in cases governed by the Mayukha, it is governed by rules laid down in the Mayukha and set forth in the next two sections.

(*t*) *Janglubai* v. *Jetha* (1908) 32 Bom. 408, 413.
(*u*) *Dubhin Parbati Kuer* v. *Baijnath Prasad* (1935) 14 Pat. 518.
(*v*) *Jagannath* v. *Runjit Singh* (1898) 25 Cal. 354; *Authikesavulu* v. *Ramanujam* (1909) 32 Mad. 512, 3 I. C. 541; *Chunilal* v. *Surajram* (1909) 33 Bom. 433, 3 I. C. 765; *Jagannath* v. *Narayan* (1910) 34 Bom. 553, 7 I. C. 459 [even among Sudras belonging to a respectable family].
(*w*) (1910) 34 Bom. 553, 7 I.C. 459, *supra*.
(*x*) *Ram Kali* v. *Gopal Dei* (1926) 48 All. 648, 96 I. C. 757, ('26) A.A. 557.

SUCCESSION TO STRIDHANA—ACCORDING TO THE MAYUKHA.

150. Classification of stridhana—Mayukha Law.—For the purposes of succession the Mayukha divides stridhana into two classes, namely:— Ss. 150, 151

(i) technical or proper; and
(ii) non-technical or improper.

(i) Technical stridhana is confined to gifts and bequests from relations made at any time, and gifts from strangers made before the nuptial fire or at the bridal procession [s. 113, sub-s. (*6*)]. It is sub-divided, for the purposes of succession, into four classes, namely:—

(1) *sulka*, which is defined as property given as the equivalent of household utensils, of beasts of burden, of milch cattle, or ornaments;

(2) *yautaka*, that is gifts made to a woman *at the time* of her marriage, whilst seated with her husband on one seat, the word being derived from *yuta*, that is, 'joined together';

(3) *bhartridatta*, that is property given or bequeathed to a woman by her *husband*; and *anwadheyaka*, that is property given or bequeathed to a woman *subsequent* to her marriage by her relations or by her husband's relations (*y*); and

(4) other kinds of technical stridhana [ss. 116 and 126].

(ii) Non-technical stridhana includes property *inherited* by a woman (*z*) in cases where she takes such property as stridhana [s. 130], the earnings of a woman, the maintenance (if any) fixed for her (*a*), property given or bequeathed to her by *strangers* (*b*) excepting that given before the nuptial fire and at the bridal procession and other kinds of property not included in technical stridhana.

151. Succession to stridhana—Mayukha Law.—The Mayukha prescribes different lines of descent for the four classes of

(*y*) See *Gopal Chandra* v. *Ram Chandra* (1901) 28 Cal. 311; *Ram Gopal* v. *Narain* (1906) 33 Cal. 315; *Basanta* v. *Kamikshya* (1906) 33 Cal. 23, 32 I. A. 181. All these are Dayabhaga cases.

(*z*) *Vijiarangam* v. *Lakshuman* (1871) 8 Bom. H. C. O. C. 244.

(*a*) *Manilal* v. *Bai Rewa* (1893) 17 Bom. 758.

(*b*) *Bai Narmada* v. *Bhagwantrai* (1888) 12 Bom. 505.

S. 151 technical stridhana [s. 150], and a further different line of descent for non-technical stridhana, in all five different lines.

I. *Succession to technical stridhana*—

(1) *Sulka* [s. 150 (*1*)] devolves in the order mentioned in s. 146, sub-s. (*1*).

(2) *Yautaka* [s. 150 (*2*)] goes to unmarried daughters (*c*).

But what if there be no unmarried daughters? Is it to go at once to the relations named in cl. III below? It is suggested by an eminent writer that it should go in default of unmarried daughters, to married daughters and their issue as under the Mitakshara [see s. 147], and, if there be none of these, then to the relations specified in cl. III of this section. See Banerjee's "Hindu Law of Marriage and Stridhana," 5th ed., p. 402.

(3) *Bhartridatta* [gift or bequest from husband], and *Anwadheyaka* [gift from relations *subsequent* to marriage], pass in the following order (*d*):—

(1) sons and unmarried daughters, taking together in equal shares (*e*); failing unmarried daughters,

(2) sons and married daughters, taking together in equal shares; failing sons and daughters,

(3) daughters' issue, that is, daughters' daughters and daughters' sons [s. 160]; next,

(4) sons' sons [s. 160];

(5) failing these, the persons mentioned in cl. III below.

(4) *Other kinds of technical stridhana* (ss. 116 and 126) pass in the following order:—

(1) unmarried daughters;

(2) married daughters who are unprovided for;

(3) married daughters who are provided for;

(4) daughters' issue, that is, daughters' daughters and daughters' sons [s. 160];

(*c*) *Ashabai* v. *Haji Tyeb* (1885) 9 Bom. 115, 126.
(*d*) 9 Bom. 115, 126, *supra*.
(*e*) *Dayaldas* v. *Savitri Bai* (1910) 34 Bom. 385, 6 I. C. 533.

(5) sons ; S. 151

(6) sons' sons [s. 160] ;

(7) failing these, the persons mentioned in cl. III below.

II. *Succession to non-technical stridhana*—

Non-technical stridhana, that is, stridhana other than the four kinds of stridhana mentioned above [s. 150], passes in the following order (*f*) :—

(1) sons ;

(2) sons' sons [s. 160] ;

(3) sons' sons' sons ;

(4) daughters ;

(5) daughters' sons [s. 160] ;

(6) daughters' daughters [s. 160] ;

(7) failing these, the persons mentioned in cl. III below.

Property *inherited* by a female can be stridhana only in the Bombay school, and that too only in the cases specified in s. 130, sub-s. *3*. Such property, in cases governed by the Mayukha, devolves as non-technical stridhana (*g*).

III. *Succession to stridhana where no issue.*—Where a woman dies without leaving any issue, her stridhana of every description (except *sulka*) goes, if her marriage took place in an approved form to her husband, and failing him, to her heirs in her husband's family, who, however, are no other than her husband's heirs [mentioned in note (1) to s. 147 above]. But if the marriage took place in an unapproved form, it goes to her mother, then to her father, and then to her father's heirs (*h*) [sec. 147, note (2)].

Non-technical stridhana.—The Mitakshara prescribes only one line of succession for all kinds of stridhana except *sulka*. The Mayukha draws a distinction between technical and non-technical stridhana. As to *bhartridatta* and *anwadheyaka*, it is to be observed that according to the Mayukha it goes to the *male* and *female* issue together; while non-technical stridhana goes, first to the *male* issue, and then to the *female* issue. The Mitakshara draws no such distinction. According to that authority non-technical stridhana, like technical, goes first to the *female* issue (*i*). In a Bombay

(*f*) *Manilal* v. *Bai Rewa* (1893) 17 Bom. 759 ; *Bai Raman* v. *Jagjivandas* (1917) 41 Bom. 618, 41 I. C. 277, ('17) A. B. 229 [sons take before grandson].

(*g*) (1893) 17 Bom. 758, 768, *supra*.

(*h*) See *Kesserbai* v. *Hunsraj* (1906) 30 Bom. 431, 451, 33 I.A. 176, 197.

(*i*) *Jankibai* v. *Sundra* (1890) 14 Bom. 612; *Gulappa* v. *Tayawa* (1907) 31 Bom. 453.

S. 151 case (*j*), under the Mitakshara, where a woman, married in an approved form, succeeded to her mother's Stridhan property and then died without leaving any descendants or any heir in her husband's family but leaving a brother and a sister it was held that (1) the property should go to her father's heirs and (2) that the brother and sister took equally. The first part of the decision is correct, but it is submitted that the second part is not and the learned Judge ought to have held that the brother took in preference to the sister. The reasoning that the property should go to the father's heirs because on marriage the woman's Gotra is her husband's Gotra and her relations in her father's family are not her Sagotra Sapindas but her Bhinna Gotra Sapindas or Bandhus, and further that in Bombay there is no preference given to males over females in Bandhus succession [citing *Rajeppa* v. *Gangayya* (*k*) and *Manilal* v. *Bai Rewa* (*l*) a Mayukh case] is, it is submitted, not sound. The learned Judge has discussed the question of Bandhu succession to the deceased woman. No such question has arisen in Hindu law. There was no dispute that on the facts the property had to go to the father's heirs and the learned Judge had, in one place, come to that conclusion on the authorities. Then the only question was which of the two heirs of the father, namely, his son and daughter was to be preferred. Clearly the son is preferred to the daughter. However, even as far as Bandhu succession is concerned, there is no authority which lays down that male and female Bandhus related in the same degree take equally. No such proposition appears to have been laid down in the two cases relied upon. In *Rajeppa* v. *Gangayya* both the claimants were males, and all that was decided was that it made no difference that in one case there were two females intervening and that in the other there was only one. The case of *Manilal* v. *Bai Rewa* does not support the reasoning of the learned Judge in as much as there it was held that the daughters of the woman were to be preferred to her husband as her heirs. In the Privy Council case of *Kenchava* v. *Giri Mallappa* (1924) 48 Bom. 569, in a contest between the father's sister's son and father's brother's daughters, the son was preferred. [See also *Jatindra Nath* v. *Nagendra Nath* (1931) 58 I.A. 372, 59 Cal. 576]. The principle of justice, equity and good conscience, also relied upon is hardly applicable.

Where the woman dies childless.—It will be observed on comparing sec. 147 (2) with cl. iii of this section that when a woman dies childless, and the marriage was in an approved form, her Stridhana according to the Mitakshara goes to *her husband's heirs* while under the Mayukha it goes to *her heirs in her husband's family*. Notwithstanding this seeming dissimilarity between the language of the Mitakshara and the Mayukha, the heirs both under the Mitakshara and the Mayukha are the same (*m*). The reason is that a woman's heirs in her husband's family are *no other than her husband's heirs*. These are enumerated in note (1) to sec. 147 above.

How is it that a woman's heirs in her husband's family are the same as her husband's heirs? The reason is, that it is a leading doctrine of the Mitakshara school that a wife becomes on marriage the sapinda of the husband, and her individuality is merged in him. The wife, by her marriage, is born again in the husband's family, and becomes half the body of the husband. It is by virtue of this doctrine that the husband's sapindas become the sapindas of his wife. The wife's sapindas, however, in her father's family do not become the husband's sapindas. The reason for this lies in the wife's subordinate position and dependence (*n*).

(*j*) *Vithal Tukaram* v. *Balu Bapu* (1936) 60 Bom. 671, 38 Bom. L. R. 520, 164 I. C. 268, ('36) A. B. 283.
(*k*) (1923) 47 Bom. 48, 77 I.C. 219, ('22) A.B. 420.
(*l*) (1893) 17 Bom. 758.
(*m*) *Vijiarangam* v. *Lakshuman* (1871) 8 Bom. H.C.O.C.J. 244. See particularly remarks of West, J., at p. 257 *et seq.* where he compares both the Mitakshara and the Mayukha law bearing on the subject of Stridhana.
(*n*) *Janglubai* v. *Jetha* (1908) 32 Bom. 409, 413; *Gojabai* v. *Shrimant Shahajirao* (1893) 17 Bom. 114, 118.

D.—SUCCESSION TO STRIDHANA—MADRAS SCHOOL.

152. Succession to stridhana—Madras school.—(*1*) The leading commentaries of the Madras school are the Smriti Chandrika and the Parasara Madhavya. Besides the said commentaries there are two other commentaries which are of more or less authority in the Madras school, namely, the Saraswati Vilasa and the Vyavahara Nirnaya. The recent tendency of the High Court of Madras has been, where the said commentaries do not agree with one another, to follow the Mitakshara not only as regards the definition of stridhana but as regards succession to stridhana [s. 118]. We propose, first, to state the rules of succession given in the Smriti Chandrika, and then to consider which of them have been rejected by the High Court of Madras. We select the Smriti Chandrika, for though by no means exhaustive on the question of succession to stridhana, it is more comprehensive than the other commentaries. **S. 152**

(*2*) The Smriti Chandrika recognizes technical stridhana only, in other words it confines stridhana to gifts from relations made at any time, and gifts from strangers if made before the nuptial fire or at the bridal procession [s. 118]. It does not recognize non-technical stridhana. Like the Mayukha, it divides stridhana, that is technical stridhana, into four classes, namely :—

(1) *sulka* ;

(2) *yautaka* ;

(3) *bhartridatta* and *anwadheyaka* ; and

(4) other kinds of technical stridhana.

Sulka is defined as wealth received as "the price of household utensils, of beasts of burden, of milch cattle, or ornaments." *Yautaka*, *bhartridatta*, and *anwadheyaka*, have already been defined in sec. 150.

(*3*) Having noted the four classes of stridhana according to the Smriti Chandrika, we proceed to state the rules of succession according to that authority.

(i) *Sulka* devolves in the order mentioned in s. 146, sub-sec. (*1*).

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(ii) *Yautaka* passes to—

(1) unmarried daughters ; and then to

(2) sons.

(iii) *Bhartridatta* and *anwadheyaka* pass to sons and daughters, all inheriting together in equal shares. Daughters include maiden daughters and married daughters whose husbands are alive, but not widowed daughters.

(iv) Other kinds of technical stridhana pass in the following order :—

(1) maiden daughters and married daughters, who are not provided for, all taking in equal shares ;

(2) married daughters who are provided for ;

(3) daughters' daughters [s. 160] ;

(4) daughters' sons [s. 160] ;

(5) sons ;

(6) sons' sons [s. 160].

If the woman dies without leaving issue, her stridhana of all descriptions (except *sulka*) passes, if she was married in an approved form, to her husband, and if she was married in an unapproved form, to her mother, and then to her father. There is no provision in the Smriti Chandrika for the case in which there is a failure of husband or mother and father. But the Parasara Madhavya cites a text of Brihaspati which is supposed to give a right of succession to certain relations named therein, immediately after the husband or father as the case may be [see sec. 153].

As to *yautaka, bhartridatta,* and *anwadheyaka,* it will be observed that the Smriti Chandrika makes no provision for the case in which there is a failure of sons and daughters.

(*4*) Having noted the order of succession according to the Smriti Chandrika we proceed to consider the judicial decisions on the subject. Before doing so, however, it may be as well to remember that according to the Mitakshara stridhana of every description (excepting *sulka*) goes, first, to

daughters, then to daughters' children, and it is only on failure of these that it goes to sons. **Ss. 152, 153**

1. *Yautaka*, that is, gifts made at the time of marriage.—There is no recent decision as to succession to *yautaka*.
2. *Bhartridatta,* that is, gifts or bequests from the husband, and *anwadheyaka,* that is, gifts from relations made after marriage.—These two kinds of stridhana pass, according to the Smriti Chandrika, to sons and daughters jointly, but according to the Mitakshara they pass to daughters in the first instance. The Madras High Court has preferred to order of succession given in the Mitakshara (*o*).
3. As to the text of Brihaspati referred to above, the Madras High Court has refused to give effect to it on the ground that it is differently interpreted in the said four commentaries, and it has held that where a woman dies without leaving issue, her stridhana devolves according to the Mitakshara (*p*) [s. 147].
4. The Smriti Chandrika does not recognize non-technical stridhana; therefore, there are no rules in that work for the descent of such stridhana. But the Madras High Court, following the Mitakshara, has recognized as stridhana certain kinds of property which come within the category of non-technical stridhana, namely property given to a woman for her maintenance (*q*) and gifts from strangers though made during coverture (*r*), and has held that they pass according to the Mitakshara.

E.—SUCCESSION TO STRIDHANA—MITHILA SCHOOL.

153. Succession to stridhana—Mithila school.—The Vivada Chintamani, which is one of the leading authorities of the Mithila school, recognizes technical stridhana only, in other

(*o*) *Muthappudayan* v. *Ammani* (1898) 21 Mad. 58 [gift from father after marriage]; *Bhujanga* v. *Ramayamma* (1884) 7 Mad. 387 [gift from husband of immoveable property].

(*p*) *Raju* v. *Ammani* (1906) 29 Mad. 358; *Nanja* v. *Sirabagyathachi* (1913) 36 Mad. 116, 12 I. C. 128

(*q*) *Subramanian* v. *Arunachelam* (1905) 28 Mad. 1.

(*r*) *Salemma* v. *Lutchmana* (1898) 21 Mad. 100.

S. 153 words, it confines stridhana to gifts from relations, and to gifts from strangers if made before the nuptial fire or at the bridal procession. It does not recognize non-technical stridhana [s. 119]. For the purpose of succession, it divides stridhana into three classes, namely :—

(1) *sulka*, which is defined as property received by a woman at the time of her marriage, where the marriage has been celebrated in an unapproved form ;

(2) *yautaka*, defined in sec. 150 ; and

(3) technical stridhana of other descriptions.

Sulka devolves in the order mentioned in s. 146 (*1*).

Yautaka passes to unmarried daughters. Failing these, it is conceived that it passes to married daughters, then to daughters' daughters, and then to daughters' sons, as in the Mitakshara (*s*).

Technical stridhana of other descriptions passes to sons and unmarried daughters, all taking together in equal shares. Failing these, it is conceived that it passes to sons and married daughters jointly, then to daughters' daughters, and then to daughters' sons.

If the woman dies without leaving any issue, her stridhana (except *sulka*) devolves as under the Mitakshara [s. 147]. It has been so held by the High Court of Calcutta in a case from Mithila (*t*), though in a subsequent case (*u*) the same Court gave effect to a text of Brihaspati cited in the Vivada Ratnakara which is another leading authority of the Mithila school. The effect of that text is stated to be that if a woman married in an approved form dies without leaving any issue or husband, her stridhana does not go to the husband's heirs in the order of propinquity to him as under the Mitakshara, but to three special heirs named in the said text in preference to any other of the husband's heirs, namely the husband's sister's son, husband's brother's son, and husband's younger brother. If she is married in an unapproved form, and dies without leaving any issue or mother or father, her stridhana does not pass to her father's heirs in the order of propinquity to him as

(*s*) *Kamla Prasad* v. *Murli Manohar* (1934) 13 Pat. 550, 152 I. C. 446, ('34) A.P. 398.

(*t*) *Bachha* v. *Jugmon* (1886) 12 Cal. 348.

(*u*) *Mohun Pershad* v. *Kishen* (1894) 21 Cal. 344.

under the Mitakshara, but to the three special heirs named in the said text in preference to any other of the father's heirs, namely her sister's son, her brother's son, and her son-in-law. But it is not at all clear in what order the said three relations in each set are to take (*v*). The Patna High Court recently followed the earlier Calcutta case and dissented from the later case (*w*). Ss. 153, 154

F.—SUCCESSION TO STRIDHANA—DAYABHAGA SCHOOL.

154. Classification of stridhana.—Stridhana according to the Dayabhaga school [s. 120] may be divided, for the purposes of succession, into four classes, namely :—

(1) *Sulka*, that is, a present to induce the bride to go to her husband's house.

(2) *Yautaka*, that is, gifts made at the time of marriage. This term has been interpreted by the High Court of Calcutta as including not only gifts made before the nuptial fire [sec. 113, sub-sec. (*1*)], but gifts made during the continuance of the marriage ceremonies (*x*), that is the ceremonies beginning with *sraddha* and ending with that of prostrating before the husband (*y*). It is conceived that it includes gifts from strangers made before the nuptial fire and at the bridal procession.

(3) Gifts and bequests from the father made *after* marriage. [Gifts made by relations subsequent to marriage are called *anwadheyaka*. The present class relates to *anwadheyaka* from the father.]

(4) *Ayautaka*, that is, gifts and bequests from relations made *before* or *after* marriage. This class includes gifts and bequests from the father made *before* marriage, but not those made *after* marriage. The latter come under the third class. Gifts from the father *at the time* of marriage fall within the second class.

Sulka devolves in the order mentioned in s. 146, sub-s. (*2*).

We proceed to state in the next three sections the order of succession to *yautaka*, *anwadheyaka* from the father, and *ayautaka*.

(*v*) See *Kesserbai* v. *Hunsraj* (1906) 30 Bom. 431, 445-451, 33 I.A. 176, 190-197 where the text of Brihaspati is fully discussed.

(*w*) *Kamala Prasad* v. *Murli Manohar* (1934) 13 Pat. 550, 152 I.C. 446, ('34) A.P. 398.

(*x*) *Bistoo Pershad* v. *Radha Sunder* (1871) 16 W.R. 115.

(*y*) See Raghunandana's Dayattattwa, G. C. Sastri's Translation, chap. ix., 15.

S. 155 **155. Succession to yautaka.**—*Yautaka* [s. 154 (2)] passes in the following order :—

(1) unbetrothed daughters ;
(2) betrothed daughters ;
(3) married daughters who have (z), or are likely to have, sons ;
(4) barren married daughters and childless widowed daughters taking together in equal shares ;
(5) sons ;
(6) daughter's sons [s. 160] ;
(7) sons' sons [s. 160] ;
(8) sons' sons' sons ;
(9) step-sons ;
(10) step-sons' sons ;
(11) step-sons' sons' sons.

If there be none of these, the succession depends upon the form of marriage. If the deceased was married in an approved form, the *yautaka* passes to the following heirs in succession, namely :—

(1) husband ;
(2) brother ;
(3) mother ;
(4) father.

If she was married in an unapproved form, it passes in the following order, namely :—

(1) mother ;
(2) father ;
(3) brother ;
(4) husband ;

if there be none of these, the successive heirs are-

(5) husband's younger brother ;
(6) husband's brother's son ;

(z) The expression "married daughters who have a son," includes a "*widowed* daughter having a son," *Charu Chunder* v. *Nabo Sunderi* (1891) 18 Cal. 327.

(7) sister's son (*a*); Ss. 155-157
(8) husband's sister's son;
(9) brother's son;
(10) daughter's husband.

The heirs beginning with the husband's younger brother and ending with the daughter's husband are heirs mentioned in a text of Brihaspati, as to which see the observations of the Privy Council in *Kesserbai* v. *Hunsraj* (*b*), which was a case from the Bombay Presidency governed by the Mayukha law. See sec. 153, last paragraph.

(11) husband's sapindas, sakulyas and samanodakas;
(12) father's kinsmen.

156. Gifts and bequests from father after marriage.—Property given or bequeathed by the father *after* marriage passes in the same order as *yautaka* [s. 155], with this difference that—

(i) sons take *before* married daughters, and *not after* them as in the case of *yautaka* (*c*); and that

(ii) where the woman dies without leaving issue the four immediate heirs take, not in either of the two orders given in sec. 155 but in the following order, namely:—

(1) brother (*d*);
(2) mother (*e*);
(3) father;
(4) husband.

157. Succession to ayautaka.—*Ayautaka* [s. 154 (*4*)] passes in the following order:—

(1) sons and maiden (*f*) daughters (*g*), taking together in equal shares;

(2) married daughters who have, or are likely to have, sons;

(*a*) Sister's son includes step-sister's son: *Dasharathi* v. *Bipin Behari* (1905) 32 Cal. 261; *Shashi Bhushan* v. *Rajendra Nath* (1913) 40 Cal. 82, 15 I.C. 225 [step-sister's son excludes daughter's son of great-grandson of great-great-grandfather of deceased's husband].

(*b*) (1906) 30 Bom. 431, 441-452, 33 I.A. 176, 190-197.

(*c*) *Prosanno Kumar* v. *Sarat* (1909) 36 Cal. 86.

(*d*) *Gopal Chandra* v. *Ram Chandra* (1901) 28 Cal. 311 [brother takes before husband].

(*e*) *Ram Gopal* v. *Narain* (1906) 33 Cal. 315 [mother takes before husband].

(*f*) It has been held that a maiden [*coomaree*] daughter means one not only unmarried but also unbetrothed; *Sreenath* v. *Surbo* (1868) 10 W. R. 188. If so, a betrothed daughter would take after the sons and unbetrothed daughters, but before married daughters.

(*g*) *Basanta* v. *Kamikshya* (1906) 33 Cal. 32, 32 I.A. 181.

Ss. 157, 158

(3) sons' sons [s. 160];

(4) daughters' sons [s. 160];

Daughter's son does not include step-daughter's son (*h*).

(5) barren married daughters and childless widowed daughters.

The above order is according to the Dayabhaga. The Dayakrama Sangraha places the (1) son's son's son, (2) step-son, (3) step-son's son, and (4) step-son's son's son before barren married and childless widowed daughters.

If there be none of the above relations *ayautaka* passes to the following heirs in succession, irrespective of the form of marriage, namely :—

(1) brother;

(2) mother;

(3) father;

(4) husband;

(5) husband's younger brother (*i*);

(6) husband's brother's son;

(7) sister's son;

(8) husband's sister's son;

(9) brother's son;

A brother's son is preferred to a step-daughter's son (*j*), as the latter is not included in the term 'daughter's son.' Step-daughter's son comes under (11) below.

(10) daughter's husband;

(11) husband's sapindas, sakulyas and samanodakas;

(12) father's kinsmen.

VI.—RULES COMMON TO ALL THE SCHOOLS.

158. Escheat.—On failure of her husband's heirs, the stridhana of a *widow* goes to her blood relations in preference to the Crown (*k*).

(*h*) *Krishnabihari* v. *Sarojinee* (1933) 60 Cal. 1061, 347 I.C. 473, ('33) A.C. 858.

(*i*) Succeeds before the deceased woman's step-brother; *Debiprasanna* v. *Harendra* (1910) 37 Cal. 863, 6 I.C. 534.

(*j*) *Krishnabihari* v. *Sarojinee* (1933) 60 Cal. 1061, 147 I.C. 473, ('33) A.C. 858.

(*k*) *Kanakammal* v. *Ananthamathi* (1914) 37 Mad. 293, 25 I. C. 901, ('15) A.M. 18; *Ganpat* v. *Secretary of State* (1921) 45 Bom. 1106, 62 I. C. 109, ('21) A. B. 138; *Kundan* v. *Secretary of State* (1926) 7 Lah. 543; 96 I. C. 865, ('26) A. L. 673.

Ss. 159-163

159. Stridhana heirs take as tenants-in-common.—Two or more stridhana heirs inheriting stridhana together take as tenants-in-common without benefit of survivorship, even if they are members of a joint family (*l*).

Illustration.

A female Hindu dies leaving two sons who are members of a joint family. The sons inherit the stridhana. They take as tenants-in-common, and not as joint tenants. The result is that on the death of either of them, his share of the stridhana will pass to his heirs, and not to the survivor.

160. Stridhana heirs take per stirpes.—Stridhana heirs in the second generation, that is, son's sons, daughter's sons, and daughter's daughters, take *per stirpes*, and not *per capita* (*m*).

Illustration.

A female Hindu dies leaving two sons by a daughter *A*, and three sons by another daughter *B*. Her stridhana will be divided into *two* parts, of which one will go to the two sons of *A*, and the other to the three sons of *B*. To divide it *per capita* would be to divide it into *five* equal parts, and to give one share to each of the five grandsons.

161. Where stridhana heir a male.—A male inheriting stridhana takes it absolutely, and on his death it passes to his heirs.

Stridhana heirs are either males, such as sons, daughter's sons, son's sons, etc., or they are females, such as daughters, daughter's daughters, etc.

162. Where stridhana heir a female.—According to the Bombay school, a female inheriting stridhana takes it absolutely, and on her death it passes to her heirs [s. 171].

According to all other schools a female inheriting stridhana takes a limited interest in it, and on her death it passes not to her heirs, but to the next stridhana heir of the female from whom she inherited it (s. 169).

163. Illegitimate children: succession to stridhana.—(*1*) The illegitimate children of a Hindu woman are not excluded from inheritance to their mother's stridhana (*n*).

(*l*) *Bai Parson* v. *Bai Somli* (1912) 36 Bom. 424, 15 I. C. 774; *Karuppai* v. *Sankaranarayanan* (1905) 27 Mad. 300; *Jagannath* v. *Narayan* (1910) 34 Bom. 553, 558, 7 I.C. 459.

(*m*) Mitakshara, chap. ii, sec. ii, para. 16; Mayukha, chap. 4, sec. 10, para. 21; Smriti Chandrika, chap. 9, sec. 3, para. 25; Banerjee's "Hindu Law of Marriage and Stridhana," 5th ed., pp. 411, 421, see also *Karuppai* v. *Sankaranarayanan* (1904) 27 Mad. 300, 308, and *Nagesh* v. *Gururao* (1893) 17 Bom. 303, 305-306.

(*n*) Ghose's Hindu Law, 3rd ed., p. 763; *Arunagiri* v. *Ranganayaki* (1898) 21 Mad. 40; *Dundappa* v. *Bhimawa* (1921) 45 Bom. 557, 59 I.C. 561, ('21) A.B. 137 [Sudra].

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But when a woman dies leaving both legitimate and illegitimate children, the legitimate children are preferred to the illegitimate (*o*).

(*2*) The illegitimate sons of a Hindu woman are entitled to succeed to each other (*p*). But an illegitimate daughter's daughter cannot succeed to her grand-mother's stridhana (*q*).

See note (5) to sec. 147.

164. Succession to property of dancing girls (naikins) and prostitutes.—(*1*) Though prostitution, according to the Hindu law, entails degradation and loss of caste, it does not sever the tie which connects the prostitute to her kindred by blood, nor does it sever the tie of kindred between her and the members of her husband's family when she becomes a prostitute after marriage. Consequently, the property of a prostitute devolves as if it were her stridhana, so that her brother, her sister, her brother's son and other relations by blood, and her husband, her step-son and her husband's other sapindas are entitled to inherit to her (*r*).

(*2*) Where a married woman becomes a prostitute after her husband's death and dies leaving a son born in lawful wedlock and a daughter born in prostitution, the legitimate son excludes the illegitimate daughter (*s*).

(*3*) The sons of a dancing woman, though by different fathers, are entitled to succeed to each other. Similarly, the legitimate son of one of such sons is entitled to succeed to them, and also to their legitimate sons (*t*).

(*4*) Where a woman of the "dancing girl" caste does not follow her traditional calling but marries and leads the life of an ordinary married woman and reverts to her original calling after widowhood, it has been held that her position is not different from that of an unchaste married woman and

(*o*) *Meenakshi* v. *Muniandi* (1915) 38 Mad. 1144, 25 I.C. 957, ('15) A.M. 63 [legitimate son preferred to illegitimate daughter]; *Jagannath* v. *Narayan* (1910) 34 Bom. 553, 559, 7 I.C. 459.

(*p*) *Myna Boyee* v. *Ootaram* (1861) 8 M.I.A. 400; *Mayna Bai* v. *Uttaram* (1864) 2 Mad. H.C. 196.

(*q*) *Meenakshi Ammal* v. *Murugayya Mooppanar* (1940) Mad. 139, 191 I.C. 60, ('40) A.M. 463, (1940) 1 M.L.J. 288.

(*r*) *Subbaraya* v. *Ramasami* (1900) 23 Mad. 171 [step-son]; *Narain Das* v. *Tirlok* (1907) 29 All. 4 [husband]; *Hiralal* v. *Tripura* (1913) 40 Cal. 650, 19 I.C. 129 [F.B.] [brother's son]; *Narayan* v. *Laxman* (1927) 51 Bom. 784, 106 I.C. 87, ('27) A.B. 456. See also *Advyapa* v. *Rudrava* (1880) 4 Bom. 104.

(*s*) *Meenakshi* v. *Muniandi* (1915) 38 Mad. 1144, 25 I.C. 957, ('15) A.M. 63.

(*t*) *Viswanatha* v. *Doraiswami* (1925) 48 Mad. 944, 91 I.C. 193, ('26) A.M. 289.

her property devolves on her heirs according to ordinary Hindu law, that is, when it descends to daughters they take only a limited estate and a mortgage by them does not bind the reversioners (*u*).

Illustrations.

(a) *A* and *B* are the two sons of a prostitute by different fathers. *A* dies leaving *B*. *B* is entitled to succeed to *A*.

(b) *A* and *B* are the two sons of a prostitute by different fathers. *A* dies leaving a legitimate son *C*. Then *B* dies leaving *C*. *C* is entitled to succeed to *B*.

(c) *A* and *B* are the two sons of a prostitute by different fathers. *A* dies leaving a legitimate son *C*. Then *B* dies leaving a legitimate son *D*. Then *D* dies leaving *C*. *C* is entitled to succeed to *D*. The same principle applies to the remote legitimate descendants of *A* and *B*.

In the Madras case on which sub-sec. (3) of the present section is based Devadoss J., said: "It is a misnomer to call the son of a dancing woman, whose paternity is unknown, an illegitimate son. The illegitimate son is one born out of lawful wedlock, *i.e.*, no marriage was solemnized between the father and the mother. In the case of sons of prostitutes or dancing women the paternity is unknown and it is only an euphemism to call them illegitimate sons. In Roman law they are called *Nullius Filius*. Dancing women have their peculiar customs. Their status is recognized in Hindu society. Their customs have received the sanction of judicial decisions, and the adoption of girls by them is recognized by law, and the daughters of dancing women inherit in preference to their sons" (*v*).

165. Contracts by married women.—A Hindu wife is competent to contract, but her liability under the contract is limited to her stridhana (*w*).

(*u*) *Balasundaram* v. *Kamakshi Ammal* (1937) Mad. 257 ('36) A.M. 958.

(*v*) (1925) 48 Mad. 944, 946, 91 I.C. 193, ('26) A.M. 289, *supra*.

(*w*) *Nathubhai* v. *Javher* (1876) 1 Bom. 121; *Govindji* v. *Lakmidas* (1880) 4 Bom. 318; *Narotam* v. *Nanka* (1882) 6 Bom. 173; *Radhi in re the Petition of* (1888) 12 Bom. 228.

CHAPTER XI.

WOMAN'S PROPERTY.

PART II. PROPERTY ACQUIRED BY A WOMAN BY INHERITANCE.

(1) "The husband's (*daya*) gift (or heritage), a woman may deal with according to her pleasure when the husband is dead; but when he is alive, she shall carefully preserve it, or if she is unable to do the same, she shall commit it to the care of his kindred."

(2) "A sonless (widow) keeping unsullied the bed of her lord and abiding by her venerable protector, shall, being moderate, enjoy *until death; afterwards* the heirs shall take."—*Katyayana.*

[*Note.*—The above texts are the only authorities for restricting the rights of a widow in property inherited by her from her husband. As to text (2) G. Sarkar is of opinion that it really relates to stridhana consisting of *immoveable* property given by the husband, and not to property *inherited* by her from him (see sec. 141)].

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166. Property inherited by males.—When a male succeeds as heir, whether to a male or to a female, he becomes full owner of the property inherited by him, and the property at his death passes to his heirs. The only recognized exception to this rule is where property is inherited by a Hindu governed by the Mitakshara law from his father, paternal grandfather or great-grandfather.

Illustrations.

(a) A male Hindu dies leaving a brother. The brother will succeed to his property, and he will take it as *full owner* and on his death it will pass to his heirs. [This is an illustration of property inherited by a male from a *male.*]

(b) A female Hindu, who is possessed of stridhana, dies leaving a son. The son, as stridhana heir, will succeed to the property, and he will take it as *full owner* thereof, and on his death it will pass to his heirs. [This is an illustration of property inherited by a male from a female].

Except in the cases mentioned in the section, a Hindu *male* inheriting property whether from a male or from a female, has all the powers of a full owner over that property. He can sell it, or dispose of it by gift or by will, at his pleasure. Further, he becomes a *fresh stock of descent*, that is to say, the property at his death passes to *his* heirs. The rule of Hindu law is different in the case of property inherited *by female* heirs, as will be seen presently.

167. Property inherited by females.—The present chapter deals with *property inherited by females* from males as well as females. It may be considered under three heads, namely :—

(1) *Devolution* of property inherited by females.

(2) *Powers of female heirs* over such property.

(3) Remedies against unauthorized acts of a widow and other female heirs.

1—SUCCESSION TO PROPERTY INHERITED BY FEMALES.

168. Property inherited by females from males—in territories other than the Bombay Presidency.—(*1*) According to the Bengal school, the only females who can inherit the property *of a male* are (1) the widow, (2) daughter, (3) mother, (4) father's mother, and (5) father's father's mother [sec. 61]. S. 168

(*2*) Before the Hindu Law of Inheritance (Amendment) Act, 1929, the only females who could inherit to a *male* were the five mentioned in sub-sec. (*1*). By that Act three more females have been constituted heirs, namely, the son's daughter, daughter's daughter, and sister.

(*3*) The Madras school recognizes not only the said five female heirs, but others also, being those mentioned in sec. 56. These include the son's daughter, daughter's daughter and sister who are now expressly mentioned as heirs in the Act of 1929. The only difference is that while before the Act they succeeded as bandhus, under the Act they inherit with gotraja sapindas. See sec. 43, nos. 13A, 13B, and 13C. See also sec. 61A.

(*4*) According to the Bengal, Benares, Mithila and Madras schools, every female, whether she be a widow (*x*), daughter (*y*), mother (*z*), father's mother (*a*), or father's father's mother, who succeeds as heir to the property of a *male*, takes only a limited estate in the property inherited by her, and at her death the property passes not to her heir, but to the next heir of the male from whom she inherited it. [As to Bombay school, see sec. 170].

The son's daughter, daughter's daughter, and sister, who are now expressly mentioned as heirs in the Hindu Law of Inheritance (Amendment) Act, 1929, also take a limited estate, according to these schools, in the property inherited by them from the last male owner.

Illustrations.

(a) *A*, a Hindu male governed by the Bengal school of Hindu Law, dies leaving a widow and a brother. On *A*'s death, the widow succeeds as his heir. The widow then dies leaving a daughter's daughter. The widow's stridhana will pass to the

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(*x*) *Collector of Masulipatam* v. *Cavaly Vencata* (1861) 8 M. I. A. 529; *Mst. Thakoor Deyhee* v. *Rai Baluk Ram* (1867) 11 M.I.A. 139; *Bhugwandeen* v. *Myna Baee* (1866) 11 M.I.A. 487.

(*y*) *Chotay Lall* v. *Chunnoo Lall* (1878) 4 Cal. 744, 6 I.A. 15; *Mutta* v. *Dorosinga* (1881) 3 Mad. 290, 8 I.A. 99; *Venkayyamma* v. *Venkataramanayyamma* (1902) 25 Mad. 678, 29 I.A. 156.

(*z*) *Bachiraju* v. *Venkatappadu* (1865) 2 Mad. H. C. 402; *Kutti* v. *Radakrishna* (1875) 8 Mad. H. C. 88; *Jullessur* v. *Uggur* (1883) 9 Cal. 725; *Hemlatta* v. *Goluck Chunder* (1842) 7 Ben. Sel. R. 108 (new edition 127).

(*a*) *Phukar Singh* v. *Ranjit Singh* (1878) 1 All. 661.

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daughter's daughter as her stridhana heir, but the property *inherited* by her from her husband *A* will pass to the next heir of her husband, namely, his brother.

(b) *A*, a Hindu male governed by the Benares school of Hindu Law, dies in 1928 leaving a daughter and a paternal uncle. On *A*'s death the daughter succeeds as his heir. The daughter then dies leaving a daughter. The daughter's stridhana will pass to her daughter *as her heir*, but the property *inherited* by her from her father *A* will pass to the next heir of her father, namely, his paternal uncle. If *A*'s daughter dies in 1930, after the Hindu Law of Inheritance (Amendment) Act, 1929, came into force, the daughter's daughter, and not the uncle, will succeed to *A*'s estate *as A's heir*. [*Vide* notes to sec. 43, 13 (*C*).]

According to all the schools other than the Bombay school a female inheriting to a male [sec. 168] or to a female [sec. 169] is not full owner of the property inherited by her. Her power to deal with the property is limited. She cannot alienate it except for legal necessity. Nor does she become a fresh stock of descent. At her death the property passes not to her heirs, but to the next heir of the last full owner. This result has been arrived at by construing the texts of Katyayana cited above as imposing a limitation on the powers of a widow to deal with property inherited by her from her husband, and the rule is then applied to *other female heirs* by construing the word " widow " in those texts as referring to other female heirs also, namely, daughter, mother, father's mother, father's father's mother, etc.

Survivorship as between daughters.—See sec. 43, no. 5, note (2).

Custom.—A Hindu widow may by custom be entitled to her husband's property *absolutely* (*b*).

Jains.—According to the custom prevailing in U.P. and Bengal, a Jain widow takes an absolute interest in the self-acquired property of her husband inherited by her (*c*), but in U.P., not in ancestral property left by him (*d*).

169. Property inherited by females from females—in territories other than the Bombay Presidency.—According to the Bengal, Benares, Mithila and Madras schools, the rule laid down in sec. 168, sub-sec. (*3*), as to property inherited by a female *from a male*, applies also to property inherited by her *from a female*. Consequently a female inheriting property [stridhana] from a female takes only a limited estate in such property, and at her death the property passes not to her heirs, but to the next stridhana heir of the female from whom she inherited it (*e*). [As to Bombay school, see sec. 171.]

(*b*) *Krishna Bai* v. *Secretary of State* (1920) 42 All. 555, 57 I.C. 520, ('20) A.A. 101 [*Bikanir*].

(*c*) *Sheo Singh* v. *Dakho* (1878) 5 I. A. 87, 1 All. 688; *Shimbhu Nath* v. *Gayan Chand* (1894) 16 All. 379; *Harnabh* v. *Mandil* (1900) 27 Cal. 379.

(*d*) *Pahar Singh* v. *Shamsher Jang* (1931) 29 All. L. J. 314, 133 I.C. 785, ('31) A.A. 695; *Allah Diya* v. *Sama Devi* (1942) All. 745 204 I.C. 133 ('42) A.A. 331.

(*e*) *Sheo Shankar Lal* v. *Debi Sahai* (1903) 25 All. 468, 30 I.A. 202 [daughter succeeding to her mother], explained in *Subramanian* v. *Arunachelam* (1905) 28 Mad. 1, 9-12; *Lal Sheo Pertab* v. *Allahabad Bank* (1903) 25 All. 476, 30 I.A. 209; *Venkatarama* v. *Bhujanga* (1896) 19 Mad. 107; *Virasangappa* v. *Rudrappa* (1896) 19 Mad. 110; *Raju* v. *Ammani* (1906) 29 Mad. 358; *Janakisetty* v. *Miriyala* (1909) 32 Mad. 521, 3 I.C. 281; *Hari Doyal* v. *Grish Chunder* (1890) 17 Cal. 911; *Joyendra* v. *Phani* (1916) 43 Cal. 64, 33 I. C. 810, ('16) A.C. 928; *Sham Biharilal* v. *Ram Kali* (1923) 45 All. 715, 75 I.C. 495, ('24) A.A. 15; *Matru Mal* v. *Meheri Kunvar* (1940) All. 416, 189 I.C. 600, ('40) A.A. 311.

Illustration.

A, a female Hindu, who is possessed of stridhana, dies leaving a daughter. On *A*'s death her stridhana passes to her daughter as her stridhana heir. The daughter, however, takes a limited estate in the stridhana. She does not become the full owner of the property. It is not stridhana in her hands, and on her death it will pass not to her heirs, but to the next stridhana heirs of *A* to whom it originally belonged. As to who those heirs are depends on the *character* of the stridhana.

It will be seen from what is stated above that according to all the schools except the Bombay school there is no distinction between property inherited by a female from a male and that inherited by her from a female. Both these kinds of property pass to the next heirs of the last full owner.

170. Property inherited by females from males—in the Bombay Presidency.—(*1*) *Besides* the five females who can inherit to a *male* in all the schools, namely (1) the widow, (2) daughter, (3) mother, (4) father's mother, and (5) father's father's mother, the Bombay school recognises other females as heirs, namely, daughters of descendants, ascendants and collaterals within five degrees, and widows of gotraja sapindas. These include the three females now specifically mentioned as heirs in the Hindu Law of Inheritance (Amendment) Act, 1929, namely, the son's daughter, the daughter's daughter, both these being daughters of descendants, and the sister, she being a daughter of an ascendant (father).

(*2*) As regards property inherited *from males*, female heirs under the Bombay school are divided into two classes, namely :—

(i) *those who come into the gotra of the deceased owner, by marriage*, that is, the wife of the deceased and the wives of his sapindas and samanodakas [sec. 68]; and

(ii) *those who are born in the gotra of the deceased owner, but pass by marriage into a different gotra, and their daughters*. This class includes a daughter, son's daughter, daughter's daughter, sister, niece, grandniece, father's sister, and the like (*f*). See notes to sec. 130.

The son's daughter, daughter's daughter, and sister are now expressly mentioned as heirs in the Hindu Law of Inheritance (Amendment) Act, 1929. See sec. 43, nos. 13A, 13B, and 13C.

(*f*) West and Buhler, 4th ed., p. 120, f. n. (*n*); *Tuljaram* v. *Mathuradas* (1881) 5 Bom. 662, 670, 672.

S. 170 Females coming under class (i), such as a widow (*g*), mother (*h*), father's mother (*i*), father's father's mother, and widows of gotraja sapindas (*j*), *e.g.*, son's widow (*k*), brother's widow, uncle's widow, etc., take *a limited* estate in the property inherited by them from males, and on their death the property passes not to their heirs, but to next heir of the male from whom they inherited it (*l*). And this is so even if such a female succeeds immediately after the death of another female who was the widow of a gotraja sapinda and who had previously inherited the property [See ill. (2)].

Females coming under class (ii), such as a daughter (*m*), son's daughter, daughter's daughter, sister (*n*), father's sister, niece (*o*), grandniece (*p*), sister's daughter and the like, take the property inherited by them from males *absolutely*, that is, they become full owners thereof. Such property becomes stridhana in their hands, so that in cases governed by the Mitakshara law (*q*), it passes to the stridhana heirs mentioned in sec. 147, cl. (2), and in cases governed by the Mayukha (*r*), it passes to the stridhana heirs mentioned in s. 151, cl. II.

Illustrations.

(1) A male Hindu, governed by the Bombay school, dies leaving a daughter. On his death, the daughter succeeds to the property as his heir. She takes the estate absolutely. She can dispose of it by gift or will. If she dies intestate, the property will go to her stridhana heirs, and not to the next heirs of her father. Thus if she dies leaving a son and a daughter, then, if she is governed by the Mitakshara law, the property will pass to her daughter, and if she is governed by the Mayukha, the property will pass to her son. [Contrast this with ill. (b) to s. 168.]

(2) *N* and *H* are divided brothers. *H* dies leaving a son *T*. Then *N* dies leaving a widow *J*. Then *T* dies leaving a widow *M*. Then *J* dies and on her death *M* succeeds to *N*'s property as *N*'s brother's [*A*'s] son's [*T*'s] widow. Here *M* inherits the property

(*g*) *Bhaskar* v. *Mahadev* (1869) 6 Bom. H. C. O. C. I.

(*h*) *Vrijbhukandas* v. *Bai Parvati* (1908) 32 Bom. 26 ; *Narsappa* v. *Sakharam* (1869) 6 Bom. H.C., A.C. 215 ; *Vinayak* v. *Lakshmibai* (1861) 1 Bom. H. C. 117.

(*i*) *Dhondi* v. *Radhabai* (1912) 36 Bom. 546, 16 I.C. 343 ; *Madhavram* v. *Dave* (1897) 21 Bom. 739, 744.

(*j*) *Lulloobhoy* v. *Mankuvarbai* (1878) 2 Bom. 388, *affd. subnom; Lulloobhoy* v. *Cassibai* (1881) 5 Bom. 110, 7 I.A. 212 ; (1897) 21 Bom. 739, *supra.*

(*k*) *Gadadhar* v. *Chandrabhagabai* (1892) 17 Bom. 600 [F. B.].

(*l*) *Bhau* v. *Raghunath* (1906) 30 Bom. 229, 237, per Jenkins, C. J.

(*m*) *Balwant Rao* v. *Baji Rao* (1920) 47 I.A. 213, 48 Cal. 30, 57 I.C. 545, ('21) A.PC. 59 ; *Pranjivandas* v. *Devkuvarbai* (1859) 1 Bom. H.C. 130 ; *Haribhat* v. *Damodarbhat* (1879) 3 Bom. 171 ; *Bulakhidas* v. *Keshavlal* (1882) 6 Bom. 85 ; *Babaji* v. *Balaji* (1881) 5 Bom. 660 ; *Bhagirthibai* v. *Kahnujirav* (1887) 11 Bom. 285 ; *Jankibai* v. *Sundra* (1890) 14 Bom. 612 ; *Gulappa* v. *Tayawa* (1907) 31 Bom. 453 ; *Vitappa* v. *Savitri* (1910) 34 Bom. 510, 7 I.C. 445 ; *Jawahir Lal* v. *Jarau Lal* (1924) 46 All. 192, 79 I.C. 861, ('24) A.A. 350 [Nagar Brahmans].

(*n*) *Vinayak* v. *Lakshmibai* (1861) 1 Bom. H. C. 117, affirmed in *Venayeck* v. *Luxemeebaee* (1864) 9 M. I. A. 520; *Rindabai* v. *Anacharya* (1891) 15 Bom. 206.

(*o*) (1897) 21 Bom. 739, 744, *supra.*

(*p*) *Tuljaram* v. *Mathuradas* (1881) 5 Bom. 662.

(*q*) (1907) 31 Bom. 453, *supra.*

(*r*) *Vijiarangam* v. *Lakshuman* (1871) 8 Bom. H.C. O.C. 244. So much of this decision as lays down that the property will descend as if the daughter was a male is no longer law, having regard to the decision in *Manilal* v. *Bai Rewa* (1893) 17 Bom. 758, which was approved by the Privy Council in *Kesserbai* v. *Hunsraj* (1906) 30 Bom. 431, 33 I.A. 176.

of *N*, a male, and she inherits it as a widow of a gotraja sapinda. She therefore takes only a limited estate, though she succeeds immediately after the death of another female *J*. *J*, as *N*'s widow, took only a Hindu window's estate. She could not, therefore, be a fresh stock of descent. What *M* inherits is not the property of *J*, but of her husband *N* (*s*). Ss. 170, 171

According to the Bombay school, two or more daughters, sisters, or nieces, take an absolute estate in severalty, and not as joint tenants (*t*). Any one of them may, therefore, alienate her share by sale or gift or give it by will.

It will be seen from what has been stated above that in the Bombay Presidency, the general leaning is in favour of women's proprietary capacity. In other parts of British India, the principle is that property inherited by a woman cannot stay in the family into which she has married, but must revert *in every case* to the family in which she was born.

171. Property inherited by females from females—in the Bombay Presidency.—(*1*) According to the Bombay school, a female inheriting property *from a female* takes it absolutely, that is, she becomes full owner thereof. Such property becomes stridhana in her hands, so that in cases governed by the Mitākshara, it passes to the stridhana heirs mentioned in sec. 147. cl. (2), and in cases governed by the Mayukha it passes to the stridhana heirs mentioned in sec. 151, cl. II. [See ill. (1).]

(*2*) The same rule applies though the female inheriting *from a female* inherits as the widow of a gotraja sapinda. [See ill. (2).]

Illustrations.

(1) *A*, a Hindu male, governed by the Bombay school, dies leaving a daughter and mother. The daughter succeeds to *A*'s property as his heir. Being a daughter she takes the property absolutely [s. 170], and on her death it will pass to her stridhana heir. Suppose now that the daughter dies a maiden, leaving her father's mother as her only heir. The father's mother will take [s. 145] the property *absolutely* as stridhana under the present section with power to dispose of it by gift or will, and on her death intestate the property will pass to her stridhana heirs (*u*). [Note that a father's mother inheriting to her *grandson* takes a limited estate, and on her death the property passes not to her heirs, but to the next heirs of the grandson. In the case given in the illustration, she inherits to her *grand-daughter*. Contrast this with the illustration to s. 169.

(2) *A*, a Hindu male, governed by the Bombay school, dies leaving a son *S*, and a widow *W*, of a predeceased son. On *A*'s death *S* succeeds to his estate. Then *S* dies leaving a daughter *D*. *D*, as a daughter, takes an *absolute* estate in the property of her father *S*. *D* then dies a maiden. On her death *W* succeeds to *her* estate as the nearest sapinda of *D*'s father *S*, being *D*'s father's brother's widow [s. 145]. *W* takes an absolute

(*s*) *Madhavram* v. *Dave* (1897) 21 Bom. 739.
(*t*) *Vithappa* v. *Savitri* (1910) 34 Bom. 510, 7 I.C. 445; *Bindubai* v. *Anacharya* (1891) 15 Bom. 206.
(*u*) *Gandhi Maganlal* v. *Bai Jadab* (1900) 24 Bom. 192 [F.B.] (case of grandmother inheriting grand-daughter's stridhana); *Parshottam* v. *Keshavlal* (1932) 56 Bom. 164, 137 I.C. 56, ('32) A.B. 213, see *Bhau* v. *Raghunath* (1906) 30 Bom. 229, 236, 237.

interest in *D*'s property, though she inherits as the widow of a gotraja sapinda, that is as *D*'s uncle's widow (*v*).

(3) *P* died in 1890. In 1904 his widow *U* adopted *B*. A suit between *U* and *B* was compromised, *U* being given a life interest in the immoveable property and the remainder being vested in *B*. *B* died in 1916 leaving his widow *L* who died in December 1916, and an infant daughter who died in January 1917. Here when *B* died his widow *L* took a limited estate in his property. When *L* died his infant daughter succeeded to it absolutely and *U* succeeded to her under the rule in this section. *U*, therefore, takes an absolute estate in the remainder belonging to *B*. This added to her life estate, makes her absolute owner of the property. It must be observed that *U* does not succeed to *B* but to his infant daughter (*w*).

172. Share allotted to a woman on partition.—The share allotted to a wife, mother or father's mother on partition is not her stridhana, unless it was given absolutely to her, and it descends on her death not to her heirs, but to the sons or grandsons out of whose portion it was taken. See s. 128 above.

173. Summary of sections 168 to 171.—The following is a summary of the rules contained in ss. 168 to 171 :—

(*1*) According to the Bengal, Benares, Mithila and Madras schools, every female who succeeds as an heir, whether to a male or to a female, takes a limited estate in the property inherited by her, and on her death the property passes not to her heirs, but to the next heir of the last full owner.

(*2*) According to the Bombay school—

(a) Property inherited by every female from a female, and property inherited from a male by female heirs other than those who come into the *gotra* of the deceased owner by marriage, is stridhana, and the provisions of the last chapter apply to it; but

(b) Females who come into the *gotra* of the deceased owner by marriage take a limited estate in the property inherited by them from a male, and on their death the property passes to the next heir of the last full owner.

(*3*) The expression " *limited* estate " in this section is used in contradistinction to "stridhana " or " *absolute* estate." The rest of this chapter deals with the incidents of " limited estate."

(*v*) *Narayan* v. *Waman* (1922) 46 Bom. 17, 63 I C. 1001. ('22) A.B. 134.

(*w*) *Parshottam Bahechardas* v. *Keshav Dalpatram* (1932) 56 Bom. 164, 137 I.C. 561, ('32) A.B 213.

II.—POWERS OF FEMALE HEIRS OVER INHERITED PROPERTY.

174. Limited heirs.—(*1*) According to the Bengal, Benares, Mithila and Madras schools *every* female who succeeds as an heir, whether to a male or to a female, takes a limited estate in the property inherited by her [ss. 168-169]. Thus a widow, daughter, mother, father's mother, father's father's mother, son's daughter, daughter's daughter, and sister take a limited estate. So do female bandhus in the Madras Presidency. And so do all female stridhana heirs. **Ss. 174, 175**

(*2*) In the Bombay Presidency, every female who succeeds as an heir *to a female* takes the property absolutely [s. 171]. But as regards property inherited from a *male*, those females who by marriage have entered into the *gotra* (family) of the deceased owner take a *limited* estate, while other female heirs take absolutely (*x*). Thus a widow, mother, father's mother, father's father's mother, and widows of gotraja sapindas, *e.g.*, son's widow, brother's widow, uncle's widow, etc., take a limited estate. All these are females who come into the *gotra* of the deceased by marriage. All other female heirs such as a daughter, sister, niece, etc., take absolutely [s. 170].

(*3*) It follows from what has been stated above that the following females, inheriting from a male, take a limited estate according to all the schools, namely, (1) widow, (2) mother, (3) father's mother, and (4) father's father's mother. The daughter takes absolutely in the Bombay school; in every other school she takes a limited estate. The son's daughter, daughter's daughter, and sister, who are now expressly mentioned as heirs in the Hindu Law of Inheritance (Amendment) Act, 1929, also take absolutely in the Bombay school; in every other school they take a limited estate.

(*4*) Females who take a *limited* or *restricted* estate in property inherited by them are hereinafter called "limited heirs."

175. Reversioners.—(*1*) The heirs of the last full owner, who would be entitled to succeed to the estate of such owner on the death of a widow or other limited heir, if they be then living, are called "reversioners." A reversioner may be a male or a female (*y*).

(*x*) *Gandhi Maganlal* v. *Bai Jadab* (1900) 24 Bom. 192, 214 [F.B.].

(*y*) *Maniram* v. *Keri Kolitani* (1880) 7 I.A. 115, 154, 5 Cal. 776, 789-790; *Sham Sunder* v. *Achhan Kunvar* (1899) 21 All. 71, 25 I.A. 183.

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(2) *Interest of reversioners.*—The interest of a reversioner is an interest *expectant* on the death of a limited heir. It is *not a vested interest.* It is a *spes successionis* or a *mere chance of succession* within the meaning of the Transfer of Property Act, 1882, sec. 6. It cannot, therefore, be sold, mortgaged or assigned, nor can it be relinquished. A transfer of a *spes successionis* is a nullity, and it has no effect in law (*z*). The widow as guardian of a minor reversioner and not as representing the estate cannot enter into a compromise or agreement to refer disputes to arbitration so as to affect the minor's rights when the estate comes into the minor's possession (*a*). But the interest of a reversioner is an interest within the meaning of s. 174 Bengal Tenancy Act and the reversioner is a person "interested" within the meaning of s. 17 of the same act (*b*).

(3) Where there are several reversioners entitled successively to succeed to an estate held for life by a Hindu widow, no one of such reversioner can be said to claim through or derive his title from another reversioner, but each derives his title from the last full owner (*c*).

Illustrations.

(a) A Hindu, *A*, dies leaving a widow, a brother, a son of that brother, and an uncle. Here the brother, his son, and the uncle are all reversioners. The brother is the "next" or "presumptive" reversioner. The other reversioners are "remote" or "contingent" reversioners. If the brother dies in the widow's lifetime, his son becomes the "next" reversioner. Suppose now that the brother dies first, and then the widow. In that case the brother's son will succeed to *A*'s estate, *not as the heir of his father*, for *A*'s property never vested in his father, *but as the heir of his uncle, A.*

(b) A Hindu, *F*, dies leaving a widow, *A*, a mother, *B*, a father's mother, *C*, and a father's brother, *D*. Here there are three reversioners of whom two, namely, *B* and *C*, are *females*, and one, namely, *D*, is a *male*. On *F*'s death, his widow, *A*, will succeed to

(z) *Janaki Ammal* v. *Narayanasami* (1916) 43 I.A. 207, 209, 39 Mad. 634, 638, 37 I.C. 161, ('16) A.PC. 117; *Venkatnarayana* v. *Subbammal* (1915) 42 I.A. 125, 128, 38 Mad. 406, 410-411, 29 I.C. 298, ('15) A.PC. 124; *Amrit Narayan* v. *Gaya Singh* (1918) 45 I.A. 35, 45 Cal. 590, 44 I.C. 408 ('17) A.PC. 59 [renunciation]; *Jagan Nath* v. *Dibbo* (1909) 31 All. 53, 1 I.C. 818; *Nund Kishore* v. *Kanee Ram* (1902) 29 Cal. 355; *Annada* v. *Gour Mohan* (1921) 48 Cal. 536, 65 I.C. 27, ('21) A.C. 501; *Manickam* v. *Ramalingah* (1906) 29 Mad. 120; *Muthuveeru* v. *Vythilinga* (1909) 32 Mad. 206, 3 I.C. 476; *Pindiprolu* v. *Pindiprolu* (1907) 30 Mad. 486; *Ramchandar* v. *Kallu* (1908) 30 All. 497; *Bhana* v. *Cuman* (1918) 40 All. 384, 44 I.C. 629, ('18) A.A. 184; *Gangabai* v. *Hari Ganesh* (1921) 45 Bom. 1167, 62 I.C. 680, ('21) A.B. 446; *Dhoorjeti* v. *Dhoorjeti* (1907) 30 Mad. 201 [renunciation]; *Musammat Bhagwati* v. *Jagdam* (1921) 6 Pat. L.J. 604, 621-622, 62 I.C. 933, ('21) A.P. 260; *Harnath Kuar* v. *Indar Bahadur Singh* (1923) 50 I.A. 60, 45 All. 179, 71 I.C. 629, ('22) A.PC. 403 [limitation]; *Annada Mohan* v. *Gour Mohan* (1923) 50 I.A. 239, 50 Cal. 929, 74 I.C. 499, ('23) A.PC. 189 [limitation]; *Thakur Prasad* v. *Musammat Dipa Kuer* (1931) 10 Pat. 352, 365, 134 I.C. 129, ('31) A.P. 142. See also *Ma Yait* v. *Mahomed* (1927) 5 Rang. 145, 102 I.C. 690, ('27) A.R. 165.

(a) *Anant Narayana, Singh* v. *Gaya Singh* 45 I.A. 33, 45 Cal. 590, 44 I.C. 408; *Musammat har Naraini Kunwar* v. *Sajjan Palsingh & Ors.* (1940) All. 719, (1940) Kar. 366, 190 I.C. 184, 67 I.A. 387, ('40) A.PC. 181.

(b) *Susheela Sundaree* v. *Bishnupada De* (1933) 60 Cal. 636, 146 I.C. 641, ('33) A.C. 622.

(c) *Bhagwanta* v. *Sukhi* (1900) 22 All. 33 [F.B.]; *Bahadur Singh* v. *Mohar Singh* (1901) 29 I.A. 1, 8-9, 24 All. 94; *Lala Soniram* v. *Kanhaiya Lal* (1913) 40 I.A. 74, 35 All. 227, 19 I.C. 291; *Srimutty Manokrani Debi* v. *Haripada* (1914) 18 C. W. N. 718, 24 I.C. 311, ('14) A.PC. 161; *Rangasami* v. *Nachiappa*, (1919) 46 I.A. 72, 83 84, 42 Mad. 523, 536, 50 I.C. 498, ('18) A.PC. 196.

his property. On *A*'s death, *F*'s property will *revert* or pass to *F*'s next heir, *B*, if she is then living. On *B*'s death, *F*'s property will *revert* to his next heir *C*, if she is then living. On *C*'s death, *F*'s property will *revert* or pass to *D*, if he is then living. *D*, however, will take the property as *full* owner and on his death it will pass to his own heirs and not to *F*'s heirs.

Spes successionis.—" Under the Hindu law the death of the female owner opens the inheritance to the reversioners, and the one most nearly related at the time to the last full owner becomes entitled to possession. In her lifetime, however, the reversionary right is a mere possibility or *spes successionis* " (*d*). " A Hindu reversioner has no right or interest *in praesenti* in the property which the female owner holds for her life. Until it vests in him on her death, should he survive her, he has nothing to assign or to relinquish or even to transmit, to his heirs (*e*). His right becomes concrete only on her demise; until then it is mere *spes successionis* " (*f*). No effect can be given to a contract for sale of a reversion made by a reversioner before the reversion has fallen in even though the reversioner succeeds to the reversion on the widow's death (*g*). Further, the interest of a reversioner being a mere *spes successionis*, he is not entitled to redeem a mortgage of the estate, executed by the widow's husband, in the lifetime of the widow (*h*).

Jats.—Among Jats who have migrated to the district of Meerut from the Punjab there exists a custom by which reversioners irrespective of degree succeed equally to the last male owner, each branch of the family taking its share *per stirpes* (*i*).

Burden of proof.—It is incumbent on a plaintiff seeking to succeed to property as a reversioner to establish affirmatively the particular relationship which he puts forward. He is also bound to satisfy the Court that to the best of his knowledge there are no nearer heirs (*j*).

176. Widow's estate.—A widow or other limited heir is not a tenant-for-life, but is owner of the property inherited by her, subject to certain restrictions on alienation, and subject to its devolving upon the next heir of the last full owner upon her death (*k*). The whole estate is for the time vested in her, and she represents it completely (*l*). As stated in a Privy Council case (*m*), " her right is of the nature of a right of property; her position is that of owner; her powers in that character are, however, limited; but . . . . so long as she is alive no one has any vested interest in the succession."

A widow under the Hindu law takes a special and qualified estate, and she has a limited power of disposition of her

(*d*) *Venkatanarayan* v. *Subbammal* (1915) 42 I.A. 125, 128, 38 Mad. 406, 410, 411, 29 I.C. 298, ('15) A.PC. 124; *Lakshmi* v. *Anantharama* (1937) Mad. 948 [F.B.], 171 I.C. 7, ('37) A.M. 699.

(*e*) *Sm. Shakuntala Devi* v. *Kaushalya Devi* (1936) 17 Lah. 356, 162 I.C. 718, ('36) A.L. 124.

(*f*) *Amrit Narayan* v. *Gaya Singh* (1918) 45 I.A. 35, 39, 54 Cal. 590, 603, 44 I.C. 408, ('17) A. PC. 59.

(*g*) *Jagannada* v. *Prasada Rao* (1916) 39 Mad. 554, 29 I.C. 241, ('16) A.M. 579.

(*h*) *Chhotey Singh* v. *Surat Singh* (1930) 5 Luck. 691, 123 I.C. 211, ('30) A.O. 294.

(*i*) *Dharam Singh* v. *Hira* (1922) 44 All. 390, 65 I.C. 828, ('22) A.A. 141.

(*j*) *Rama Row* v. *Kuttiya* (1917) 40 Mad. 654, 34 I.C. 294, ('17) A.M. 872; *Javitri* v. *Gendan Singh* (1927) 49 All. 779, 102 I.C. 167, ('27) A.A. 767; *Mt. Barfo* v. *Narain Prasad* (1938) 13 Luck. 167, 167 I.C. 72, ('37) A. O. 243.

(*k*) *Bijoy Gopal* v. *Krishna* (1907) 34 Cal. 329, 34 I.A. 87, 91-92.

(*l*) *Moniram* v. *Keri Kolitani* (1880) 5 Cal. 776, 789, 7 I.A. 115, 154.

(*m*) *Janaki Ammal* v. *Narayanasami* (1916) 43 I.A. 207, 209, 39 Mad. 634, 637, 37 I.C. 171, ('16) A. PC. 117.

S. 176 husband's property. The restrictions on her power of alienation are *inseparable from her estate*, and their existence does not depend on that of heirs capable of taking on her death. If, for want of heirs, the right to the property passes to the Crown, the Crown has the same power that an heir would have of protecting its interests by impeaching any unauthorized alienation by the widow (*n*). See sec. 185A.

The estate taken by a Hindu widow in property inherited by her from her husband is called "Widow's estate," or "Woman's estate." The estate taken by every other limited heir is similar in its incidents to a widow's estate. The incidents of a widow's estate are set forth in ss. 177 to 201.

A widow or other limited heir does not take merely an estate for life, for, as will be seen presently, she can in certain cases dispose of the *whole* estate inherited by her which she could not do if she were a mere life-tenant. What vests in her is not a mere life-estate, but the whole estate. Further, she represents the estate *completely*, and it is for this reason that in certain cases a decree passed against her with reference to property inherited by her binds not only herself, but also the reversioners, though the reversioners were not parties to the suit. In other words the estate of a Hindu widow is an absolute one *subject to certain restrictions*.

Incidents of widow's estate.—The expression "stridhana" predicates an *absolute* estate; the expression "widow's estate" implies a *limited* estate. A female takes an absolute estate in her stridhana, but she takes a qualified estate in *property inherited by her* except in certain cases governed by the Bombay school [s. 173]. When she takes a qualified estate, it is said that she takes a *widows' estate*. The following is a brief statement of the peculiar features of a *widow's estate* :—

(1) The estate taken by a widow in property inherited by her from her husband may best be described by saying that she is the owner thereof, except that she cannot sell the *corpus* of the property or mortgage it, or make a gift of it, or grant leases thereof for a long term, or otherwise alienate it, unless it be for legal necessity or for the benefit of the estate *or* with the consent of the next reversioners. Where an alienation is made by her for a legal necessity or with the consent of the next reversioners, it passes an absolute estate to the alienee to the same extent as an alienation made by a full owner [ss. 178-185].

A widow inheriting her husband's property takes it and holds it as his legal representative. Rents accruing from it are to be considered as part of his estate and as such are liable to pay his debts and to be attached in execution of simple money decree obtained against him (*o*).

(2) Subject to the above restrictions on alienation, she holds the property absolutely, and she completely represents it. She may, therefore, institute suits in respect of the property, and she may be sued in respect thereof, and decrees passed against her as *representing* the estate in respect of debts or other transactions binding on the estate, are binding not only on her, but on the reversioners, though the reversioners are not parties to the suit [s. 199].

(*n*) *Collector of Masulipatam* v. *Cavaly Vencata* (1861) 8 M.I.A. 529, 553.

(*o*) *Phool Kunwar* v. *Rikhi Ram* (1935) 57 All. 714, 153 I. C. 865, ('35) A.A. 261.

(3) If she is dispossessed of any portion of the property by a third person, she can sue to recover it, but if she fails to sue and allows the possession of such person to become adverse to her, the reversioners are not affected by such adverse possession for they succeed not as her heirs, but as her husband's heirs, and they may, therefore, sue for possession within 12 years from the date of her death [s. 201].

Where a widow or other limited female owner sues for arrears of profits against a sharer and obtains a decree and executes it but on appeal the amount is reduced, the liability to refund is personal to her and does not attach to the estate so as to bind the reversioner after her death (*p*).

(4) She can sell her *life interest* in the property or mortgage it or make a gift of it to anyone she likes. She is entitled to the whole income of the property. She may spend the income in any way she likes. She is not bound to pay her husband's debts out of the income, nor is she bound to maintain the members of her husband's family out of the income, or to perform their marriage ceremonies out of the income. She can throw the burden of all these charges on the *corpus* of the property, and sell or mortgage the same to meet those expenses, such expenses being regarded in law as legal necessities (*q*) [ss. 177 to 181].

(5) The entire estate being vested in her, she is entitled to manage the same. But she must manage it as a prudent owner would do. She must not commit waste or do any act injurious to the revision [s. 198].

(6) The limitations imposed upon her estate are not imposed upon her for the benefit of reversioners. They are inseparable from her estate, so that even if there be no reversioners, she cannot alienate the *corpus* of the property except for a legal necessity. If she does alienate it without legal necessity, then if there be no reversioners, the alienation may be set aside by the Crown taking the property by escheat (*r*).

(7) A widow cannot by any act or declaration of her own, while retaining possession of her husband's estate, give her possession or estate a character different from that attaching to the possession or estate of a Hindu widow (*s*).

The incidents of the estate taken by other limited heirs, such as the mother, father's mother, daughter (except in the Bombay school), are similar to those of the widow's estate.

177. Income and savings from income.—A widow or other limited heir is not a trustee for the reversioners (*t*). She has absolute power of disposal of the *income* of the property inherited by her. She is not bound to save the income. She may spend the whole income upon herself, or give it away as she likes during her life (*u*). But difficult questions arise when the income is *accumulated* either when the estate is in her possession or in the possession of others. Where the property

(*p*) *Kishan Lal* v. *Muhammad Ishaq* (1938) All. 761 (F.B.), 176 I.C. 509, ('38) A.A. 426.

(*q*) *Debi Dayal* v. *Bhan Pertap* (1904) 31 Cal. 433.

(*r*) *Collector of Masulipatam* v. *Cavaly Vencata* (1860) 8 M.I.A. 520; *Kundan* v. *Secretary of State* (1926) 7 Lah. 543, 96 I.C. 865, ('26) A.L. 673.

(*s*) *Sham Lall* v. *Amarendro* (1896) 23 Cal. 460, 473; *Kanni Ammal* v. *Ammakannu* (1900) 23 Mad. 504. See also *Brij Indar* v. *Janki Koer* (1877) 5 I.A. 1, 1 C.L.R. 318; *Kashi Prasad* v. *Inda Kunwar* (1908) 30 All. 490.

(*t*) *Viraraju* v. *Venkataratnam* (1939) Mad. 226.

(*u*) *Hurrydoss* v. *Sreemutty Uppoornah* (1856) 6 M.I.A. 433; *Biswanath* v. *Khantomani* (1870) 6 Beng. L. R. 747; *Grose* v. *Amirtamayi* (1869) 4 Beng. L. R. O. C. 1, 40-41; *Sarat Chandra* v. *Charusila* (1928) 55 Cal. 918, 112 I.C. 508, ('28) A.C. 794.

S. 177 was not inherited by her but a life estate is given to her by deed, no question of an intention to treat the accumulated income as an accretion to the main estate can arise in as much as there is a separation of the income from the date of the deed and she is not the representative of the last male owner (*v*). [*Vide* s. 127 (4) ante].

The law as to the right of a widow or other limited heir to accumulations of the income of the estate of the last male holder may be considered under six heads, namely :—

(1) Accumulations of income which accrued during the life of her husband or other male whom she succeeds.

(2) Accumulations of income after his death and before delivery of the estate to her.

(3) Accumulations of income of the estate made by herself personally.

(4) Arrears of income and income held in suspense.

(5) Accumulations of income where the income is given to her by her husband by deed or will.

(6) Accretion to the estate in other cases.

(1) *Accumulations which accrued during husband's life.*—Accumulations which accrued during the husband's life form part of the corpus of the estate. They are accretions to the estate, and the widow succeeds to both for a woman's estate (*w*).

(2) *Accumulations between death and delivery and afterwards realised by the limited owner.*—Cases have arisen in which possession of the estate has been withheld from the widow, and the estate together with the accumulations of income is eventually handed over to her long after her husband's death ; or in which the corpus of the estate is bequeathed by the husband to others, but there is an intestacy as to the income and the income which has accumulated owing to litigation or other causes is handed over to the widow long after the husband's death. As these *accumulations* accrue *after* the husband's death, the widow does not take them by succession. She takes them as she would have taken the *income itself* had she

(*v*) *Mohinee Mohan Basu* v. *Rash Biharee Ghosh* (1937) 2 Cal. 97, 169 I. C. 519, ('37) A.C. 229.

(*w*) *Chandrabulee* v. *Brody* (1868) 9 W. R. 584, 585 ; *Sreemutty Soorjeemoney Dossey* v. *Denobundoo* (1862) 9 M.I.A. 123; *Sreemutty Soorjeemoney Dossey* v. *Denobundoo* (1857) 6 M.I.A. 526.

been let into possession at once, that is, as Stridhana (*x*) and she may spend them as she chooses. But the question still remains whether, if she keeps them distinct for some time she is entitled to deal with and dispose of the *accumulations* as she would have been entitled to do with the *income* if she has been let into possession at once and there had been no accumulations. This question should be determined by the intention of the widow to treat the accumulations as accretions to the estate or as her own absolute property. If she does nothing to indicate an intention to make the fund received, or the interest on it, part of her husband's estate (which was in *other* hands), or to justify the inference that she wished it to revert to her husband's heirs, the fund is her stridhana which she may dispose of by deed or will. But if she does indicate such intention or does any act to justify such inference, she takes only a widow's estate in the fund, and she cannot dispose of it except for legal necessity, and on her death it passes to her husband's heirs. This was the view taken by the Judicial Committee in *Saodamini Dasi* v. *Administrator-General of Bengal* (*y*), decided in 1892. **S. 177**

The leading case on the subject is *Saodamini Dasi* v. *Administrator-General of Bengal* referred to above. In that case a Hindu by his will gave Rs. 1,00,000 to his wife for her maintenance, and bequeathed the residue of his property to his brother if no adoption as directed by him could be made to him within eight years from his death. The will made no provision in regard to the income of the residue during the eight years, and the widow became entitled to that income as on intestacy. The testator died in 1856. No adoption was made within eight years, and the estate vested in the brother. In 1865, the widow claimed the accumulations of income for eight years as her absolute property. In 1866, an agreement was entered into between the widow and the brother under which he paid to her a lump sum of Rs. 2,89,000 in full satisfaction of her claim to accumulations. This sum she invested in Government promissory notes. In July, 1886, she executed a deed of settlement by which she transferred the securities to the Administrator-General of Bengal to be held by him upon trust to pay the income thereof to her for her life and after her death to transfer the securities to her grandson. She died in September, 1886, and on her death the securities were claimed by her husband's reversioners on the ground that she took only a widow's interest in the accumulations and that she had therefore no power to dispose of them by will. The Judicial Committee, affirming the decree of the Calcutta High Court, upheld the widow's will. Dealing with the point, their Lordships said: "The appellant's counsel contended that the savings of a Hindu widow must be presumed to have been made for the benefit of her husband's estate. Without examining the precise result of the decisions, it is sufficient to say that in this case there is no room for any such presumption for the *corpus* of the estate never came to the widow, but was taken by *Shamchurn Mullick* under the will, and the income

(*x*) *Sreemutty Soorjeemoney Dossey* v. *Denobundoo* (1862) 9 M. I. A. 123, 138-139; *Isri Dut* v. *Hansbutti* (1883) 10 Cal. 324, 335, 10 I.A. 150.

(*y*) (1892) 20 I.A. 12, 20 Cal. 433 [estate in hands of executor—settlement by widow of accumulations upheld].

S. 177 to which the widow succeeded was separated from it, and became and was dealt with as an entirely separate fund. To use the words of Mr. Justice Trevelyan in reference to Badamcomaree's position : 'There was no estate of her husband's in her hands for her to augment.' She did nothing to indicate an intention to make the fund received, or the interest on it part of her husband's estate which was in other hands, or to justify the inference that she wished it to revert to her husband's heirs."

(3) *Accumulations made by the widow personally.*—The third case is where the accumulations are made by the widow herself personally, and either are invested by her or remain uninvested in her hands. A widow, as stated above, may spend her whole income either upon herself, or by giving it away as she likes during her life. She is not bound to make any savings. But if she does make savings, the question arises whether she has the same power of disposal of the savings as she has of the income, or whether the savings are to be treated as accretions to the estate, that is, as part of the corpus of the estate, so as to be subject to the same restraint on alienation as the corpus itself [s. 178]. The trend of decisions is that the case should be determined by the intention of the widow. If she does nothing to indicate an intention to make the savings part of her husband's estate, or to justify the inference that she wished them to revert to her husband's heirs, the savings are her stridhana (y^1) which she may dispose of by deed or will. But if she indicates any such intention or does anything to justify any such inference, she takes only a widow's estate in them, and she cannot dispose of them except for legal necessity, and on her death they will pass to her husband's heirs. Thus if she invests the savings in the purchase of land or securities, and makes no endeavour or attempt for the purpose of distinguishing the original estate from the after-purchases, but deals with the after-purchases in the same manner as the original estate, it is an indication of intention on her part to treat the after-purchases as accretions to the original estate, and she cannot alienate them for any purpose which would not justify alienation of the original estate. But if there is no evidence of any dealing on her part which would show that she intended to treat the after-purchases as accretions to her husband's estate, then the savings are her stridhana which she may dispose of by deed or will, and on her death intestate they will pass to her stridhana heirs (z).

(y^1) *Prabhakar* v. *Sarubhai* (1943) Nag. 779, 208 I. C. 211, ('43) A. N. 253.

(z) *Isri Dut* v. *Hansbutti* (1883) 10 Cal. 324, 337, 10 I. A. 150; *Sheolochun* v. *Saheb Singh* (1887) 14 Cal. 387, 393-394, 14 I.A. 63; *Nirmala* v. *Deva Narayan* (1928) 55 Cal. 269, 276, 104 I. C. 284, ('27) A. C. 868; *Dulhin Parbati Kuer* v. *Baijnath Prasad* (1935) 14 Pat. 518, 155 I.C. 213, ('36) A.A. 200.

It has thus been held that where a widow inherits landed property in a village from her husband, and with the savings of the income of that property she purchases other lands *in the same village*, and *long after the purchase* she makes a gift *both of the original estate and the after-purchases to one and the same person* (being the daughter in that case), only reserving to herself a life-interest in part of them, the after-purchases constitute accretions to the estate which she has no power to alienate except for a purpose which would justify alienation of the original estate (*a*). It has similarly been held that where the widow erects buildings on land belonging to the husband's estate (*b*), or deposits money belonging to her husband's estate with a banker upon the understanding that the interest at the end of every year shall be added to the principal and the amalgamated sum should be treated as a fresh deposit (*c*), the buildings and the accumulations of the interest must be deemed to be accretions to the estate, and descendible to the husband's heirs. **S. 177**

In *Isri Dut* v. *Hansbutti* (*d*) which was the first authoritative pronouncement on accumulations and savings, their Lordships of the Privy Council said: "But their Lordships do not treat as authorities on this question the numerous cases cited at the Bar, to show that a widow's savings from her husband's estate are not her stridhanam. If she has made no attempt to dispose of them in her lifetime, there is no dispute but that they follow the estate from which they arose. The dispute arises when the widow, who might have spent the income as it accrued, has in fact saved it and afterwards attempts to alienate it. In this case the properties in question consists of shares of lands, in which the husband was a share holder to a larger extent. They were purchased within a short time after his death in 1857. No attempt to alienate them was made till 1873. The object of the alienation was not the need or the personal benefit of the widows, but a desire to change the succession, and to give the inheritance to the heirs of one of themselves in preference to their husband's heirs. Neither with respect to this object, nor apparently in any other way, have the widows made any distinction between the original estate and the after purchases parts of both are conveyed to Dyji immediately, and parts of both are retained by the widows for life. These are circumstances which, in their Lordships' opinion, clearly establish accretion to the original estate, and make the after purchases inalienable by the widows for any purpose which would not justify alienation of that original estate." This case was followed by the same tribunal in *Sheo Lochun Singh* v. *Saheb Singh* (*e*). In the judgment their Lordships said: "Where a widow comes into possession of the property of the husband, and receives the income and does not spend it, but invests it in the purchase of other property, their Lordships think that, *prima facie*, it is the intention of the widow to keep the estate of the husband as an entire estate, and that the property purchased would, *prima facie*, be intended

(*a*) (1883) 10 Cal. 324, 10 I.A. 150, *supra*; (1887) 14 Cal. 387, 14 I. A. 63, *supra*.
(*b*) *Venkata* v. *Surenani* (1908) 31 Mad. 321.
(*c*) *Narayan* v. *Suppiah* (1920) 43 Mad. 629, 58 I.C. 639, ('20) A. M. 983.
(*d*) (1883) 10 Cal. 324, 337, 10 I. A. 150.
(*e*) (1887) 14 Cal. 387, 393, 14 I. A. 63,66.

S. 177 to be accretions to that estate. There may be, no doubt, circumstances which would shew that the widow had no such intention, that she intended to appropriate the savings in another way."

In *Nabakishore* v. *Upendrakishore* (*f*), the Judicial Committee said: "Now there can, their Lordships think, be no doubt that whatever stridhana she possessed was due to the accumulated savings from the income of the property which she received from her husband's estate, and though it is true that when that property had been received it would be possible for her so to deal with it that it would remain her own, yet it must be traced and shown to have been so dealt with, and in this case there is no sufficient evidence of this having been done."

On the other hand, if she advances the savings made by her on a mortgage of land and subsequently assigns the mortgage for value (*g*), or purchases land with the savings and not very long after the purchase mortgages it as her own and afterwards makes a gift of it (*h*), or purchases land with the savings and soon after the purchase makes a gift of it (*i*), the subsequent acquisitions cannot be treated as accretions to the original estate, her conduct in all these cases being consistent only with an intention to treat them as her own absolute property.

In *Akkanna* v. *Venkayya* (*j*), the High Court of Madras observed with reference to the dictum in *Sheo Lochen Singh* v. *Saheb Singh* above quoted. "This was only a dictum which must be understood with reference to the facts and circumstances of that case which it was held indicated that it was the intention of the widows to keep the estate entire, and that the same should descend in one line of succession" and further proceeded as follows :—

"The acquirer of property presumably intends to retain dominion over it, and in the case of a Hindu widow the presumption is none the less so when the fund with which the property is acquired is one, which though derived from her husband's property, was at her absolute disposal.... Her absolute power of disposition over the income derived from [her] limited estate being now fully recognized, it is only reasonable that, in the absence of an indication of her intention to the contrary, she must be presumed to retain the same control over the investment of such income. The mere fact that properties thus acquired by her are managed and enjoyed by her without any distinction, along with properties. In a case where the widow purchased a house and within less than 4 months sold the property it was held by the Allahabad High Court that it is for the person who alleges that she meant to keep the property as her Stridhana to prove that it is so (*k*). It is submitted that this decision is inconsistent with the later decisions of the Privy Council.

Where the widow lends part of her savings on mortgage to the next reversioner, and afterwards obtains a decree against him for the amount of the loan and takes proceedings in execution, but dies pending execution, the person entitled to proceed with the execution is her stridhana heir, her conduct manifest-

(*f*) (1922) 42 Mad. L. J. 253, 74 I. C. 612, ('23) A.PC. 563.
(*g*) *Akhanna* v. *Venkayya* (1902) 25 Mad. 351.
(*h*) *Wahid Ali* v. *Tori Rama* (1913) 35 All. 551, 21 I.C. 91.
(*i*) *Keshav* v. *Maruti* (1922) 46 Bom. 37, 62 I.C. 954, ('22) A.B. 144.
(*j*) (1902) 25 Mad. 351.
(*k*) *Bhagwan Das* v. *Bittam* (1945) All. 148.

ing a clear intention to treat the decretal amount representing the savings as her own absolute property (*l*). A purchase of property by a widow out of the savings of the income in the name of another person, affords an indication of an intention to treat the property as her own (*m*). Where there is nothing to indicate the intention of a limited owner about the immovable properties acquired by her out of the savings of the property of the last man holder the presumption is that she intended to keep them at her absolute disposal (*m*1). **S. 177**

When a woman's stridhana was inherited by her two minor daughters but was managed for them by their guardians who purchased some additional property out of its income and one of the daughters died before obtaining possession of the estate, her share of the property purchased was held to belong to her absolutely as stridhana and descended to her heir and not to the other daughter (*n*).

(4) *Income held in suspense or unrealized by the limited heir.*—A widow or other limited heir may not have recovered the rents of the estate inherited by her, or she may have obtained decrees for arrears of rent and may not have realised them, or she may have recovered the arrears of rent and realised the decrees but may not have invested the amount. In cases such as these the question arises whether on her death the arrears of income or the decrees held by her or the income held in suspense constitute her stridhana or whether they constitute "savings" or "accumulations". Dealing with this question, the High Court of Bengal in a case decided in 1876 said: "But what are accumulations in the view of these cases? Not surely the accidental balances of one or two years of the widow's income, but a fund distinct and tangible. There is nothing whatever in this case to indicate that any such fund ever had been formed or had existed" (*o*). In another case, the High Court of Bombay said "In the present case the cash balance in question does not amount to more than half the yearly payment and had not been separated so as to form a distinct fund (*p*). In *Venkatadri* v. *Parthasaradhi* (*q*) the Rani

(*l*) *Sita Ram* v. *Dulam* (1919) 41 All. 350, 50 I. C. 372 ('19) A A. 338.

(*m*) *Nirmala* v. *Deva Narayan* (1928) 55 Cal. 269, 275, 104 I.C. 284, ('27) A.C. 868.

(*m*1) *Prabhakar* v. *Sarubhai* (1943) Nag. 779, 208 I. C. 211, ('43) A. N. 253.

(*n*) *Kailasanath Mudaliar* v. *Vadiranni* (1935) 58 Mad. 488, ('35) A.M. 740.

(*o*) *Sreemutty Puddo* v. *Dwarka Nath Biswas* (1876) 25 W.R. 335, 341.

(*p*) *Rivett-Carnac* v. *Jivibai* (1886) 10 Bom. 478.

(*q*) 48 Mad. 312, 52 I.A. 214, ('25) A.P.C. 105.

S. 177 of Medur who became entitled to the estate on the death of her son and its income till her death filed a suit to recover the estate. Pending the disposal of the suit the estate was in the hands of a receiver appointed by the Court. Before the suit was disposed of she died leaving a Will bequeathing the income of the estate. The Judicial Committee observed " that income or any part of it she could while she remained entitled to it, have added as an accretion to the Medur estate if she had wished to do so. There is no evidence to suggest that she had ever added any part of that income as an accretion to the Medur estate. She was consequently entitled to dispose of it by will or otherwise." In *Balasubrahmania* v. *Subbayya* (*r*) the estate was under the court of wards who were in possession of the savings of the income. The Rani could not make any attempt to dispose of it during her life time, but left a will bequeathing the accumulations. Their Lordships observed " The High Court held that the savings were the personal property of the Rani and would pass under her will. Their Lordships see no reason to differ from the High Court's findings. Following the second of the sentences in *Isri Dutt* v. *Hunsbutti* cited above, it has been held in Calcutta (*s*) that if the widow does not dispose of in her lifetime the arrears of income or the decrees held by her or the income held in suspense, she cannot dispose of them by her will and they pass on her death to her husband's heirs. But the decision in *Venkatadri* v. *Parthasaradhi* was not referred to by PAGE, J. and in a recent Calcutta decision (*t*) it was observed " He held her Will to be ineffective. It would, however, be difficult to agree with all his reasonings on the later point". But, when there is no will and the income is unrealised (*e.g.*, when due under decrees not yet executed) it is held in Calcutta and in Oudh (*u*) that the right to the income will not pass to the Stridhana heirs of the limited owner.

(5) *Accumulations of income granted by husband by deed or will.*—Where by a deed or will the husband grants the income of his property to his wife for her life, and the *corpus* is given to others, the savings from such income and the property purchased out of such savings are her stridhana, and they pass to her stridhana heirs. They are not accretions to

(*r*) (1938) M. 551, 65 I.A. 93, ('38) A.PC. 34.

(*s*) *Sarat Chandra* v. *Charusila* (1928) 55 Cal. 918, 112 I.C. 508, ('28) A.C. 794.

(*t*) *Surendranath Basu* v. *Radha Rani Debi* (1940) 2 Cal. 415, 187 I.C. 108, 67 I. A. 129, ('40) A. PC. 45.

(*u*) *Sarnam* v. *Raja Bisheshwar* (1930) 5 Luck. 608, 125 I.C. 161, ('31) A.O. 66.

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the estate for the simple reason that the *corpus* of the estate is in other hands (*v*). The widow takes the income not as a widow, but as a taker of a life estate under the settlement or will (*w*). Similarly, savings from maintenance allowance directed to be paid to a widow under a decree out of the husband's estate and property purchased out of such savings are her stridhana, and they pass to her stridhana heirs (*x*).

(6) *Enlargement of estate inherited by a widow.*—The estate inherited by a widow from her husband may be enlarged otherwise than by savings from the income. Thus it may be enlarged by action of Government (*y*), or by compromise with the superior owner (*z*), or otherwise (*a*). In such cases the enlarged estate is still a widow's estate. The enlargement is no more than an accretion to her husband's estate; it does not change the character of the estate so as to convert the widow's estate into stridhana.

It has been held in the undermentioned cases that a female heir derives no stronger title from the fact that the Inam Commissioner has enfranchised in her name property inherited from a male, and has given a new title deed in her name. In *Venkata* v. *Veerabhadrayya* (*b*), the Judicial Committee held that when karnam service lands have been enfranchised, a quit rent being imposed in lieu of the service, and an inam title deed is granted comprising the lands to the holder of the office, his representatives and assigns, the lands are his separate property, and are not subject to any claim for partition by other members of the family. Following the principle of this decision, the High Court of Madras has recently held that where a similar enfranchisement takes place in favour of a widow of karnam service lands and a similar title is given to her, she takes an absolute interest in the lands (*c*). When the widow, at her husband's wish, rounded off the property by acquiring another portion and treated both as one, it was held that a case of accretion had been established and that she could not alienate the acquired property as if it were her own (*d*).

178. Limited power of disposal of immoveable property.—To uphold an alienation, by a widow or other limited heir,

(*v*) *Srimati Krishna* v. *Bhaiya Rajendra* (1927) 2 Luck. 43, 82-89, 104 I. C. 15, ('27) A.O. 240 [legacy]; *Bhugbutti Das* v. *Bholanath* (1875) 2 I.A. 256, 25 W. R. 168.

(*w*) *Isri Dut* v. *Hansbutti* (1883) 10 Cal. 324, 336, 10 I.A. 180.

(*x*) *Subramanian* v. *Arunachelam* (1905) 28 Mad 1.

(*y*) *Vangalu* v. *Vangala* (1906) 28 Mad. 13; *Kashi Prasad* v. *Inda Kunwar* (1908) 30 All. 490; *Subbaroya* v. *Aiyaswami* (1909) 32 Mad. 86, 1 I.C. 749.

(*z*) *Ram Shankar* v. *Lal Bahadur* (1926) 1 Luck. 98, 92 I.C. 637, ('26) A.O. 277.

(*a*) *Nabakishore* v. *Upendra Kishore* (1923) 37 Cal. L.J. 319, 74 I. C. 612, ('23) A. C. 563 [purchase by widow of rights of tenants in occupation of her husband's estate].

(*b*) (1921) 48 I. A. 244, 44 Mad. 643, 61 I. C. 667, ('22) A. PC. 96.

(*c*) *Pulaniyandi* v. *Velayudam* (1929) 52 Mad. 6, 112 I. C. 320, ('29) A.M. 93.

(*d*) *Bharosa Shukul* v. *Manbasi Kuer* (1932) 54 All. 1014, 143 I. C. 259, ('32) A. A. 690.

Ss. 178, 179 of the *corpus* of immoveable property inherited by her, it should be shown (*e*)—

(1) that there was legal necessity (*f*) (ss. 181-182); *or*

(2) that the alienee, after reasonable inquiry as to the necessity acted honestly in the belief that the necessity existed (ss. 181-182); *or*

(3) that there was such consent of the next reversioners to the alienation as would raise a presumption that the transaction was a proper one (s. 183); *or*

(4) that it was a surrender by her of her whole interest in the whole estate in favour of the nearest reversioner or reversioners at the time of alienation (s. 197).

Where any one of the first three positions is established, the alienation may be of the *whole* or *any part* of the estate; but where the fourth alone is proved then the alienation must be of the whole estate.

A widow or other limited heir has no power to dispose of the *corpus* of immoveable property inherited by her except in the four cases mentioned above.

A widow may alienate her husband's property to pay a debt incurred by her for legal necessity though that debt is barred at the time of alienation (*g*).

179. Limited power of disposal of moveable property.— In territories other than the Bombay Presidency, a widow or other limited heir has no greater power of disposal over moveable property inherited by her than over immoveable property, and she cannot dispose of it by deed or will (*h*). The same is the law in the Bombay Presidency in cases governed by the Mitakshara (*i*). But in cases governed by the Mayukha, it has been held that she can dispose of moveable property inherited by her by act *inter vivos*, that is, by sale, gift, or otherwise (*j*), but not by *will*, and what remains of the property at her death descends to the next heirs of the last full

(*e*) *Debi Prasad* v. *Golap Bhagalt* (1913) 40 Cal. 721, 752, 753, 19 I.C. 273 [F.B.]; *Rangaswami* v. *Nachiappa* (1919) 42 Mad. 523, 46 I.A. 72, 50 I.C. 498, ('18) A. PC. 196.

(*f*) *Fateh Singh* v. *Raghubir Svhai* (1938) All. 904 (F.B.) (relates to usufructuary mortgage rights inherited by widow).

(*g*) *Daroga Rai* v. *Basdeo Mahto* (1937) 16 Pat. 45, 166 I.C. 555, ('27) A.P. 40.

(*h*) *Bhugwandeen* v. *Myna Baee* (1C67) 11 M.I. A. 487 (Benares); *Durga Nath* v. *Chinta Moni* (1904) 31 Cal. 214 (Bengal); *Buchi* v. *Jagapathi* (1885) 8 Mad. 304 (Madras).

(*i*) *Pandharinath* v. *Govind* (1908) 32 Bom. 59.

(*j*) *Bechar* v. *Bai Lakshmi* (1863) 1 Bom. H. C. 56; *Bhagirthibai* v. *Khanujirav* (1887) 11 Bom. 285, 297.

owner (*k*). So also moveable property obtained by a Hindu widow in a partition with her son stands on the same footing as moveables acquired by inheritance and therefore, may be disposed of by her during her life time unrestricted by any rights of other persons (*l*). See, however, sec. 2 and sec. 3 (3) of the Hindu Women's Rights to Property Act, 1937. The result is somewhat startling. **Ss. 179-181A**

180. No power to dispose of inherited property by will.—A widow or other limited heir cannot in any case dispose of *by will* property inherited by her or any portion thereof, whether the property be moveable or immoveable (*m*).

181. Alienations by widow.—A widow or other limited heir has no power to alienate the estate inherited by her from the deceased owner except for the following purposes, namely :—

(I) Religious or charitable purposes [s. 181A].

(II) Other purposes amounting to legal necessity [s. 181B].

For purposes of the first class she has a larger power of disposition than for purposes of the second class (*n*).

181A. Alienation by widow for religious or charitable purposes.—(*1*) *Extent of power of alienation.*—A widow or other female heir may alienate the estate for certain religious or charitable purposes. These purposes may be divided into two classes, namely :—

(a) The performance of the obsequial ceremonies of the deceased owner mentioned in cl. (i) below, and the payment of his debts (*o*) mentioned in cl. (iv) below.

(b) The performance of religious ceremonies of persons other than the deceased owner mentioned in cl. (ii) below, and religious or charitable acts which are supposed to conduce to the spiritual welfare of the deceased owner mentioned in cl. (iii) below.

(*k*) *Chamanlal* v. *Doshi Ganesh* (1904) 28 Bom. 453; *Gadadhar* v. *Chandrabhagabai* (1893) 17 Bom. 690; *Harilal* v. *Pranvalabdas* (1892) 16 Bom. 229.

(*l*) *Chamanlal* v. *Bai Parvati* (1934) 58 Bom 246, 150 I.C. 854, ('34) A.B. 151.

(*m*) *Thakoor Deyhee* v. *Rai Baluk Ram* (1866) 11 M.I.A. 139; *Gadadhar* v. *Chandrabhagabai* (1893) 17 Bom. 690; *Durga Nath* v. *Chintamani* (1903) 31 Cal. 214; *Narasimha* v. *Venkatadri* (1884) 8 Mad. 290; *Sarat Chandra* v. *Charusila* (1928) 55 Cal. 918, 112 I.C. 508, ('28) A.C. 794; *Tirath Ram* v. *Kahan Devi* (1920) 1 Lah. 588, 60 I.C. 101, ('21) A.L. 149; *Jagdeo Singh* v. *Mussammat Raja Kuer* (1927) 6 Pat. 788, 103 I.C. 482, ('27) A.P. 262; *Gadadhar* v. *Chandrabhagabai* (1892) 17 Bom. 690.

(*n*) *Collector of Masulipatam* v. *Cavaly Vencata* (1861) 8 M.I.A. 529, 551.

(*o*) *Ashutosh* v. *Chidam* (1930) 57 Cal. 904, 126 I.C. 263, ('30) A.C. 351.

S. 181A The first class relates to acts which are *essential and obligatory*. The second class relates to acts which although not indispensable or obligatory are still pious purposes which conduce to the benefit of the soul of the deceased. With reference to the first class of acts, the powers of the Hindu female who holds the estate are wider than in respect of the acts which are simply pious. As regards acts of the first class, if the income of the estate or the estate itself is not sufficient to cover the expenses, she is entitled to sell the whole of it. As regards the second class, she can alienate a *small portion* only of the estate for the pious or charitable purpose she may have in view (*p*); the expense that is allowable as regards this class of acts must be limited by a due regard to the entire bulk of the estate, and may even be totally disallowed where it is not warranted by the circumstances of the family.

To justify an alienation for a religious or charitable purpose, it is not necessary to show any " benefit to the estate," or to prove any " pressure on the estate," such as is necessary in the case of an alienation for other purposes (*q*) [s. 181B (*1*)].

(*2*) *What are religious or charitable purposes.*—Having stated the extent of the power of disposition of a Hindu widow or other limited heir for religious or charitable acts, we proceed to consider the precise nature of these acts. The religious or charitable acts for which an alienation may be made are as follows :—

(*i*) Performance of the funeral (*r*) and *sraddha* ceremonies (*s*) of the deceased owner. These acts are essential and obligatory.

Thus a widow may alienate property inherited by her from her husband for the performance of the funeral and *sraddha* ceremonies of the *husband*. Similarly, a daughter succeeding as heir to her *father* may alienate property inherited by her for the performance of similar ceremonies of the *father* (*t*). So debts incurred by a daughter for the *Sraddha* ceremony of her father, while the widow is alive, are on the same footing as debts incurred by the widow. Such debts bind the daughter when she succeeds as reversioner (*u*).

But this principle applies only to a widow or other limited owner or a donee from her in lawful possession. Where the property has devolved from the last owner upon

(*p*) *Sardar Singh* v. *Kunj Behari Lal* (1922) 44 All. 503, 511, 49 I.A. 383, 391, 69 I.C. 36, ('22) A.PC. 261.

(*q*) *Collector of Masulipatam* v. *Cavaly Vencata* (1861) 8 M.I.A. 529, 551; *Ram Surat* v. *Hitanandan* (1931) 10 Pat. 474, 134 I.C. 137, ('31) A.P. 330.

(*r*) *Ratanchand* v. *Javherchand* (1898) 22 Bom. 818; *Lakshminarayana* v. *Dasu* (1888) 11 Mad. 288.

(*s*) *Srimohan* v. *Brijbehary* (1909) 36 Cal. 753, 2 I.C. 152.

(*t*) *Raj Chunder* v. *Sheeshoo* (1865) 7 W.R. 146.

(*u*) *Daroga Rai* v. *Basdeo Mahto* (1937) 16 Pat. 45, 166 I.C. 555, ('37) A.P. 40.

his mother and after her death a person without lawful title enters into possession of the property, and incurs expenses for the funeral ceremonies of the mother, such person cannot claim a charge on the estate for the expenses so incurred against the reversioner (*v*).

(*ii*) Performance of religious ceremonies of persons whose ceremonies the deceased owner was bound to perform, as for instance, the *sraddha* of the husband's mother (*w*), and where a daughter inherits to her father, the performance of her mother's *sraddha* (*x*). These ceremonies are not essential or obligatory.

(*iii*) Religious or charitable acts which conduce to the spiritual welfare of her husband (*y*). These acts are not essential or obligatory.

Two sets of religious acts.—In *Sardar Singh* v. *Kunj Behari Lal* (*z*) their Lordships, after reviewing the cases on the subject, said :—

" There can be no doubt upon a review of the Hindu law, taken in conjunction with the decided cases, that the Hindu system recognizes *two sets of religious acts.* One is in connection with the actual obsequies of the deceased, and the periodical performance of the obsequial rites prescribed in the Hindu religious law, which are considered as essential for the salvation of the soul of the deceased. The other relates to acts which although not essential or obligatory, are still pious observances which conduce to the bliss of the deceased's soul. In the later cases this distinction runs clearly through the views of the learned judges. The confusion which has arisen in this case arises from mixing up the indispensable or obligatory duty with a pious purpose, which, although optional, is spiritually beneficial to the deceased. With reference to the first class of acts, the powers of the Hindu female who holds the property are wider than in respect of the acts which are simply pious and if performed are meritorious so far as they conduce to the spiritual benefit of the deceased. In one case, if the income of the property, or the property itself, is not sufficient to cover the expenses, she is entitled to sell the whole of it. In the other case she can alienate a small portion of the property for the pious or charitable purpose she may have in view . . . . . . In their Lordships' opinion the Hindu law recognizes the validity of the dedication or alienation of a *small fraction* of the property by a Hindu female for the continuous benefit of the soul of the deceased owner."

An alienation by a widow to pay off debts incurred by her for the Upanayana ceremony (investiture with the sacred thread) and marriage of her daughter's son will be upheld provided the debts are reasonable according to the ordinary notions of Hindus (*a*).

The first set of religious acts referred to above relates to the performance of the ceremonies referred to in cl. (*i*) above, and the payment of debts referred to in cl. (iv) below (*b*). Both these are religious purposes which a widow is bound to carry out *at any*

(*v*) *Nandrani* v. *Krishna Sahai* (1935) 57 All. 997, 156 I.C. 23, ('35) A. A. 698.
(*w*) *Chowdry Junmejoy* v. *Russomoyee* (1868) 11 Beng. L.R. 418 ; *Ramcoomar* v. *Ichamoyi* (1882) 8 Cal. 36.
(*x*) *Sri Mohan* v. *Brij Behary* (1908) 36 Cal. 753.
(*y*) *Collector of Masulipatam* v. *Cavaly Vencata* (1861) 8 M.I.A. 529, 551 ; *Raj Lukhee Debea* v. *Gokool Chunder* (1866) 13 M.I.A. 209 ; *Sardar Singh* v. *Kunj Behari Lal* (1922) 44 All. 503, 511, 49 I.A. 383, 391, 69 I.C. 36, ('22) A.PC. 261 affimg. (1919) 41 All. 130, 48 I.C. 847, ('18) A.A. 40 ; *Vuppuluri Tattaya* v. *Garimilla* (1910) 34 Mad. 288, 6 I.C. 240 ; *Khub Lal* v. *Ajodhya* (1915) 43 Cal. 574, 31 I.C. 433, ('16) A.C. 792.
(*z*) (1922) 44 All. 503, 511, 49 I.A. 383, 391, 69 I.C. 36, ('22) A.PC. 261.
(*a*) *Venkatasubba Rao* v. *Ananda Rao* (1934) 57 Mad. 772, 155 I.C. 79, ('34) A.M. 432.
(*b*) *Ashutosh* v. *Chidam* (1930) 57 Cal. 904, 126 I.C. 263, ('30) A.C. 351.

S. 181A *expense* to the estate as laid down in *Sardar Singh*'s case. These are absolute necessities. The second set of religious acts comprises the ceremonies referred to in cl. (ii) above, and religious or charitable acts which conduce to the spiritual welfare of the husband mentioned in cl. (iii). For these purposes the widow may make a gift of a *small portion* only of the estate as laid down in *Sardar Singh*'s case and other cases cited below (*c*). An endowment by a widow for the upkeep of Thakurdwara out of all proportion to the estate, was held not to be binding on the reversioners though they raised no objection to the construction of the Thakurdwara (*d*). The gift may be of movable property, or it may be of immovable property. The circumstance that the widow has sufficient income to provide for the observances without an alienation of the estate is immaterial, for the income is *her* property (*e*). Almost all cases under this head relate to acts conducing to the spiritual welfare of the husband. The following are instances of such acts :—

Pilgrimages for the spiritual benefit of her husband and in performance of her duty to his soul, *e.g.*, pilgrimage to Gaya for performing her husband's *sraddha* (*f*), pilgrimage to Pandharpur (*g*), but not pilgrimage to Benares (*h*); a gift to the temple of Jagannath at Puri for *bhog* (food offerings) to the diety and for the maintenance of the priests there "for the salvation of my husband and his family members and my own salvation" (*i*); a gift made by a daughter at the time of performing her father's *sraddha* on the occasion of the Pushkaram, a peculiarly holy event among the Hindus (*j*); a gift for erecting and maintaining a temple for the benefit of the soul of the husband, though it may be also for the benefit of her soul (*k*); a gift for the excavation and maintenance of a tank to be attached to a temple founded by the husband (*l*); a gift for the construction of a tank pursuant to her husband's wishes (*m*); a gift to the husband's *purohit* (priest) on the occasion of her visit to Gaya (*n*); a gift by way of *suphal sankalp* to a priest of Gaya (*o*); a gift to a family diety (*p*).

But it is not competent to a Hindu widow to alienate any portion of her husband's property for *her sole* spiritual benefit. Hence the following gifts have been held to be invalid :—

A gift by a widow to a favoured idol made sixteen months after her husband's death without any reference to him or his funeral ceremonies (*q*); a gift to the *pujari* (worshipper) of a temple established by her husband's mother for which no provision was made by the deceased himself in his lifetime (*r*); a feast given by a widow on her return from pilgrimage (*s*); a gift for building a dharamshala about sixteen years after her husband's death, there being nothing to show that the intention was to confer

(*c*) *Panachand* v. *Manoharlal* (1918) 42 Bom. 136, 43 I.C. 729, ('17) A.B. 155 [gift of four-fifths of the estate held invalid]; *Rama* v. *Ranga* (1885) 8 Mad. 552; *Bhaskar* v. *Mahadeo* (1869) 6 Bom. H.C. O.C. 1, 13; *Ram Kawal* v. *Ram Kishore* (1895) 22 Cal. 506; *Kunj Bihari Lal* v. *Lallu Singh* (1919) 41 All. 130, 48 I.C. 847, ('18) A.A. 40; *Thakur Indraj Bux* v. *Thakur Sheo Naresh* (1927) 2 Luck. 713, 104 I.C. 676, ('27) A.O. 450; *Thakur Prasad* v. *Musammat Dipa Kuer* (1931) 10 Pat. 352, 134 I.C. 129, ('31) A.P. 442.

(*d*) *Mst. Tulsha* v. *Lachhman Prasad* (1943) 18 Luck. 501, 204 I.C. 68, ('43) A.O. 109.

(*e*) (1922) 44 All. 503, 49 I.A. 383, 69 I.C. 36, ('22) A.PC. 261, *infra*.

(*f*) *Muteeram* v. *Gopal* (1873) 11 Beng. L.R. 416; *Darbari Lal* v. *Gobind* (1924) 46 All. 822, 80 I.C. 31, ('24) A.A. 902.

(*g*) *Ganpat* v. *Tulsiram* (1912) 36 Bom. 88, 12 I.C. 271.

(*h*) *Hari* v. *Bajrand* (1909) 13 C.W.N. 544, 547, 1 I.C. 434.

(*i*) *Sardar Singh* v. *Kunj Bihari Lal* (1922) 44 All. 503, 49 I.A. 383, 69 I.C. 36, ('22) A. PC. 261.

(*j*) *Tatayya* v. *Ramakrishnamma* (1911) 34 Mad. 288, 6 I.C. 240.

(*k*) *Thakur Indraj Bux* v. *Thakur Sheo Naresh* (1927) 2 Luck. 713, 104 I.C. 676, ('27) A.O. 450.

(*l*) *Khub Lal* v. *Ajodhya* (1916) 43 Cal. 574, 31 I.C. 433, ('16) A.C. 792.

(*m*) *Ram Surat* v. *Hitanandan* (1931) 10 Pat. 474, 134 I.C. 137, ('31) A.P. 330.

(*n*) *Gobind* v. *Lakhrani* (1921) 43 All. 515, 63 I.C. 221, ('21) A.A. 109; *Ishwari* v. *Babunandan* (1925) 47 All. 563, 571, 88 I.C. 193, ('25) A.A. 495 [gift to a family priest set aside, as it was of a *large* proportion of the estate].

(*o*) *Baldeo Prasad* v. *Fateh Singh* (1924) 46 All. 533, 79 I.C. 654, ('24) A.A. 933.

(*p*) *Madanmohan* v. *Rakhalchandra* (1930) 57 Cal. 570, 124 I.C. 327, ('30) A.C. 173.

(*q*) *Puran Dai* v. *Jai Narain* (1882) 4 All. 482, 484.

(*r*) *Ram Kawal* v. *Ramkishore* (1895) 22 Cal. 506. The property alienated was, moreover, about one-third of the whole.

(*s*) *Makhan Lal* v. *Gayan Singh* (1911) 33 All. 255, 9 I.C. 199.

spiritual benefit on her deceased husband (t); a gift for the construction of a temple and installation of idols for her own welfare and salvation in the next world (u), and a dedication of property to the idols installed in such temple (v); a gift to her own Guru nine years after her husband's death (w). **S. 181A**

(iv) Payment of debts of the deceased owner, even though barred by limitation whether during his lifetime or after his death (x). Payment of these debts is essential and obligatory.

A widow or other limited female heir is not bound to pay the principal amount of the last male owner's debts, for the income belongs wholly to her (y). She is only bound to pay the interest on the same out of the surplus of her income. When an alienation is made to pay off the principal and interest of a debt of the last male owner, it is not for a binding purpose so far as the interest is concerned, when she could have paid it off from her income, but if the proportion of the interest to the whole of the principal amount of the debt is small (*e.g.*, one-fifth) the whole alienation will be upheld (z).

The payment of a husband's debt by his widow who has inherited property from him falls within the first class of religious acts enunciated by the Privy Council in *Sardar Singh* v. *Kunj Bihari Lal* (a) [see note to cl. (iii) above], and is an essential duty on her part for which she may alienate the property inherited by her. The act being a religious act of the first class, there is no restriction on her power of alienation and she may sell the whole estate for that purpose (b). She may pay even a debt barred by limitation, but she is not entitled to pay a time-barred debt which was repudiated by her husband (c). But where a Hindu widow mortgages property to pay off the time-barred debt of her husband, and later on executes another mortgage to pay off the claim under the prior one which had by that time become time-barred, the last mortgage is not binding on the reversioner as it was executed only to pay off her time-barred debt (d). A daughter-in-law also is under a moral obligation to pay the time-barred debt of her father-in-law and she may alienate his property for the payment of such debts (e). But it has been held that a mother who has succeeded to her *son's* estate is not under any obligation to pay a time-barred debt of her *husband*, though the estate to which she has succeeded originally belonged to her husband; and alienation, therefore, of any part of the estate for the payment of such a debt is not binding on the reversion (f). Where a widow has paid her husband's debts with her money *in his lifetime*, the presumption is that the payment was voluntary; she cannot therefore sell her husband's property after his death to pay herself the amount (g). But a widow is not entitled to pay off her husband's debts incurred by him when he was a minor, so as to bind the reversioners of his estate (h).

(t) *Sham Dei* v. *Birbhadra* (1921) 43 All. 463, 62 I.C. 432, ('21) A.A. 178; *Munshi Lal* v. *Shiv Devi* (1923) 4 Lah. 336, 78 I.C. 266, ('24) A.L. 137.

(u) *Bishen Dayal Singh* v. *Musammat Jaisari Kuer* (1918) Pat. 323, 48 I.C. 746, ('17) A.P. 4.

(v) *Thakur Pursad* v. *Musammant Dipa Kuer* (1931) 10 Pat. 352, 134 I.C. 129, ('31) A.P. 442.

(w) *Har Mitra* v. *Raghubar* (1928) 3 Luck. 615, 110 I.C. 618, ('28) A.O. 342.

(x) *Ashutosh* v. *Chidam* (1930) 57 Cal. 904, 126 I.C. 263, ('30) A.C. 351; *Bhala* v. *Parbhu* (1878) 2 Bom. 67; *Chimnaji* v *Dinkar* (1887) 11 Bom. 320; *Kondappa* v. *Subba* (1890) 13 Mad. 189; *Udai Chunder* v. *Ashutosh* (1893) 21 Cal. 190; *Santu Ram* v. *Mst. Dodan Bai* (1928) 9 Lah. 85, 103 I.C. 706, ('27) A. L. 657; *Tulshi Prasad Jugmohanlal* (1935) 57 All. 422, 152 C. 92, ('34) A. A. 1048; *Mt. Malan Paramatmadas* (1936) 17 Lah. 588, 166 I. C. 421, ('36) A. L. 558.

(y) *Ramasami* v. *Mangaikarasu* (1895) 18 Mad. 113, 119-120; *Debi Dayal* v. *Bhan Pertap* (1904) 31 Cal. 433, 443.

(z) *Jagannadham* v. *Vighneshwaradu* (1932) 55 Mad. 216, 134 I.C. 810, ('32) A.M. 177.

(a) (1922) 44 All. 503, 49 I.A. 383, 69 I.C. 36, ('22) A.PC. 261.

(b) (1930) 57 Cal. 904, 126 I.C. 263, ('30) A.C. 351, *supra*.

(c) *Bhagwat* v. *Nivratti* (1915) 39 Bom. 113, 27 I.C. 316, ('14) A. B. 245.

(d) *Chandika Prasad* v. *Bhagavandas* (1940) 15 Lucknow, 167 I.C. 105.

(e) *Bhau* v. *Gopala* (1887) 11 Bom. 325.

(f) *Sheo Ram* v. *Sheo Ratan* (1921) 43 All. 604, 63 I.C. 279, ('21) A.A. 163.

(g) *Bhawani* v. *Himmat* (1911) 33 All. 342, 10 I.C. 274 [P.C.], affirming *Himmat* v. *Bhawani* (1908) 30 All. 352.

(h) *Bajrang Singh* v. *Gobindprasad* (1936) 11 Luck. 11, 154 I. C. 841, ('35) A. O. 873.

Ss. 181A, 181B (3) *Widow not in possession.*—A widow or other female heir who is not in possession of the estate, but is entitled to maintenance only, cannot burden the estate with any expense for religious or charitable purposes (*i*). The Court should in fixing the maintenance take into consideration the necessary religious expenses which she has to undergo (*j*), and if that has not been done, she may apply in the suit in which the decree for maintenance was passed for an increase of maintenance so as to provide for those expenses.

A and *B* are undivided brothers. *A* dies leaving a widow *R*. Then *B* dies leaving a son *D*. After *B*'s death, *R* sues *D* for maintenance, and a decree for maintenance is passed. The decree does not take into account the religious expenses *R* may have to undergo for the spiritual welfare of her husband (*D*'s paternal uncle). Afterwards *R* goes on a pilgrimage for the spiritual welfare of her husband. She then sues *D* for these expenses. She is not entitled to them. Her only remedy is to apply to the Court which passed the decree for maintenance for an increase of maintenance so as to provide for those and other religious expenses.

181B. Alienation by widow for legal necessity.—(*1*) *Extent of power of alienation.*—Having dealt with the power of a widow to alienate the estate for religious or charitable purposes, we proceed to consider the nature and extent of her power of disposition for other purposes. The power of a widow or other limited heir to alienate the estate inherited by her *for purposes other than religious* or *charitable* is analogous to that of a manager of an infant's estate as defined by the Judicial Committee in *Hunooman Persaud* v. *Mussamat Babooee* (*k*) [sec. 242, note (1)]. That power is a limited and qualified one; it can only be exercised rightly " in a *case of need* or *for the benefit of the estate* " [sub-sec. (3)]. But where the alienation is one that a prudent owner would make in order to benefit the estate, a *bona fide* alienee is not affected by the previous mismanagement of the estate. " The actual pressure on the estate, the danger to be averted, or the benefit to be conferred upon it, in the particular instance, is the thing to be regarded " (*k*). If the alienation is for purposes of legal necessity or for the benefit of the estate, it binds not only her interest in the estate, but the whole body of reversioners (*l*).

" The touchstone of the authority is necessity " (*m*). The word " necessity," when used in this connection, has a some-

(*i*) *Ramabai* v. *Dattatraya* (1931) 33 Bom. L. R. 1244, 135 I. C. 491, ('31) A. B. 497.

(*j*) *Baini* v. *Rup Singh* (1890) 12 All. 558; *Deti Persad* v. *Gunvanti Kuar* (1895) 22 Cal. 410.

(*k*) (1856) 6 M.I.A. 393; *Kameswar Pershad* v. *Run Bahadur* (1881) 6 Cal. 843, 8 I.A. 8.

(*l*) *Collector of Masulipatam* v. *Cavaly Vencata* (1861) 8 M.I.A. 529, 550-551; *Sham Sunder* v. *Acchhan Kunwar* (1898) 25 I.A. 183, 189, 192, 21 All. 71, 80, 83.

(*m*) *Sham Sunder* v. *Acchhan Kunwar* (1898) 25 I.A. 183, 192, 21 All. 71, 83.

what special, almost technical, meaning. It does not mean actual compulsion, but the kind of *pressure* which the law recognizes as serious and sufficient (*n*). The receipt even of full value for property sold by her, where there is no pressure on the estate, will not justify the sale; otherwise every transaction with a limited heir for full value would be valid (*o*). **S. 181B**

(2) *Purposes of legal necessity.*—The following purposes have been held to amount to legal necessity for which an alienation may be made :—

(*i*) Costs of taking out probate, or letters of administration, or a succession certificate in respect of the estate of the deceased owner (*p*).

(*ii*) Payment of arrears of Government revenue and of decrees for rent accrued due after the death of the deceased owner, provided she had no funds when she mortgaged or sold the property to pay the revenue or the decrees *and* the mortgage or sale was absolutely necessary in order to discharge the debt, which if not discharged would have resulted in a forcible sale of the property (*q*). If there is an actual existing necessity, the circumstances that the necessity was brought about by the mismanagement of the widow does not vitiate the mortgage or sale, unless it is shown that the mortgagee or purchaser himself contributed to the mismanagement [s. 182].

Arrears of Government revenue and of rent due by the deceased owner himself constitute his *debts*, and they fall under sec. 181 A (2) (iv) and they are payable out of his estate. But arrears of revenue and rent accrued due in respect of her husband's property *after* his death must be paid out of the gross income. If this were not so it would be open to a widow to appropriate the entire profits of the property for her own use and benefit without paying revenue or rent which is actually charged on the profits accruing from the property. A Hindu widow is not entitled, while she is in possession of the property inherited by her, to appropriate the gross profits of the property and to throw the burden of the payment of legitimate charges like those of revenue and rent upon the reversioners (*r*).

(*n*) *Ramsuran Prasad* v. *Shyam Kumari* (1922) 49 I.A. 342, 346, 1 Pat. 741, 745, 69 I.C. 71, ('22) A.PC. 356.

(*o*) *Ravaneshwar* v. *Chandi Prasad* (1916) 43 Cal. 417 [P.C.] 30 I. C. 499, ('15) A C. 57, affirming same case (1911) 38 Cal. 721, 750, 12 I.C. 931; *Nabakishore* v. *Upendra Kishore* (1923) 37 Cal. L.J. 319, 74 I.C. 612, ('23) A.C. 563.

(*p*) *Srimohan* v. *Brijbehary* (1909) 36 Cal. 753, 2 I. C. 153.

(*q*) *Jagannath* v. *Gur Charan* (1929) 4 Luck. 279, 114 I.C. 783, ('29) A.O. 422; *Rameswar* v. *Provabath* (1914) 19 C.W.N. 313, 25 I.C. 84 ('15) A.C. 141; *Srimohan* v. *Brijbehary* (1909) 36 Cal. 753, 2 I C 153; *Ganesh Lal* v *Khetra Mohan* (1926) 53 I.A. 134, 5 Pat. 585, 95 I C. 839, ('26) A.PC. 56; *Jiban* v. *Brojo Lal* (1903) 30 Cal. 550, 30 I.A. 81; *Ghanshyam* v. *Badiya Lal* (1902) 24 All. 547; *Lakshman* v. *Radha Bai* (1887) 11 Bom. 609.

(*r*) *Jagannath* v. *Gur Charan* (1929) 4 Luck. 279, 282-283, 114 I.C. 783, ('29) A.O. 422.

S. 181B

Payment of arrears of rent due under a lease taken by a widow for her own personal benefit, or of rent in respect of an exproprietary tenancy arising from the sale of her husband's property, has been held not to be for legal necessity (s).

(iii) Maintenance of herself (t), and of persons whom the deceased owner was bound to maintain, such as his mother, paternal grandmother, unmarried daughters, and the like (u), or paying off debts incurred for family expenses (v).

(iv) Marriages of relations of the deceased owner, such as his daughter, son's daughter, grandson's daughter (w), paternal uncle's son's daughter (x), and others, which are a burden on the estate.

A daughter inheriting to her father or mother may defray the marriage expenses of her own *daughter* or *daughter's daughter* out of the estate, if the father of the girl to be married, is a man of no means and is unable to defray those expenses (y). But a widow inheriting to her husband is not entitled to defray the marriage expenses of her *daughter's daughter* (z).

No hard and fast rule can be laid down as to the amount of marriage expenses (a).

(v) Gift by a widow to her daughter on the occasion of her marriage or at her *gauna* ceremony (b), also a gift to her son-in-law on the occasion of the daughter's marriage (c) or a gift by way of marriage customary present called Bhat on the occasion of the marriage of her niece (husband's sister's daughter) (d), provided that in either case the gift is of a reasonable amount. But there is no rule that the daughter is entitled to ¼ share on the occasion of her marriage (e).

(s) *Ishwari* v. *Babunandan* (1925) 47 All. 563, 88 I.C. 193, ('25) A.A. 495.

(t) *Sadashiv* v. *Dhakubai* (1881) 5 Bom. 450 at p. 460. See also *Ramsumran Prasad* v. *Shyam Kumari* (1922) 49 I.A. 342, 346, 1 Pat. 741, 745, 69 I.C. 71, ('22) A.PC. 356.

(u) *Darbari Lal* v. *Gobind* (1924) 46 All. 822, 80 I.C. 31, ('24) A.A. 902.

(v) *Venkatasubba Rao* v. *Ananda Rao* (1934) 57 Mad. 772, 155 I.C. 79, ('34) A.M. 432.

(w) *Ramcoomar* v. *Ichamoyi* (1880) 6 Cal. 36; *Debi Dayal* v. *Bhan Pertap* (1904) 31 Cal. 433; *Makhan* v. *Gayan* (1911) 33 All. 255, 9 I.C. 199; *Ganpat* v. *Tulsiram* (1912) 36 Bom. 88, 12 I.C. 271 [*betrothal* of daughter]; *Bhagwati* v. *Ram Jatan* (1923) 45 All. 297, 73 I.C. 648, ('24) A.A. 23; *Mahadeo Prasad* v. *Musammat Dhanraj* (1926) 1 Luck. 477, 95 I.C. 574, ('26) A.O. 425.

(x) *Baijnath Rai* v. *Mangla Prasad* (1926) 5 Pat. 350, 90 I.C. 732, ('26) A.P. 1.

(y) *Rustom Singh* v. *Moti Singh* (1896) 18 All. 474; *Rajagopalachariar* v. *Sami Reddi* (1926) 50 Mad. L.J. 221, 93 I.C. 49, ('26) A.M. 517; *Kamla Prasad* v. *Lalji Prasad* (1930) 9 Pat. 721, 127 I.C. 842, ('30) A. P. 600; *Shrinivas Rao* v. *Annadanam Seshacharulu* (1942) Mad. 42, 198 I. C. 169, ('42) A.M. 106.

(z) *Narainbati* v. *Ramdhari* (1916) 1 Pat. L. J. 81, 34 I.C. 277, ('16) A.P. 178.

(a) (1923) 45 All. 297, 299, 73 I.C. 648, ('24) A.A. 23, *supra*; *Churaman* v. *Gopi Sahu* (1910) 37 Cal. 1, 5-6, 1 I.C. 945; (1926) 1 Luck. 477, 95 I.C. 574, ('26) A. O. 425, *supra*.

(b) (1909) 37 Cal. 1, 1 I.C. 945, *supra*; *Jowala Ram* v. *Hari* (1924) 5 Lah. 70, 80 I.C. 680, ('24) A.L. 429; *Udai Dat* v. *Ambika Prasad* (1927) 2 Luck. 412, 100 I.C. 503, ('27) A.O. 110.

(c) *Rama* v. *Vengidusami* (1898) 22 Mad. 113; *Ram Sumran* v. *Gobind Das* (1926) 5 Pat. 646, 99 I.C. 789, ('26) A.P. 582.

(d) *Gulab Devi* v. *Banwari Lal* (1940) All. 555, 190 I.C. 202 ('40) A. S. 403 (1940) A. L. J. 464. This case seems to go too far, though the plaintiff's action in questioning the alienation seems to be without any grace as it was for her own daughter's marriage.

(e) *Krishna Pratap Singh* v. *Prembada Kunwar* (1942) All. 708, 203, I.C. 97, ('42) A.A. 365, (1942) A. L. J. 487.

The fact that the gift was made a few days after the marriage would not invalidate the gift; nor the fact that daughters in the family to which the parties belong are excluded from inheritance by custom (*f*). **Ss. 181B, 181C**

(*3*) *Alienation by widow for "the benefit of the estate."*—Besides legal necessity a widow or other limited heir may alienate the estate "for the benefit of the estate" [see sec. 243 A]. An alienation of property to meet the costs of litigation necessary for preserving the estate is an alienation "for the benefit of the estate" (*g*). So too is an alienation for making necessary repairs to properties belonging to the estate. But an alienation for developing or improving the properties is not one "for the benefit of the estate," though it may bring additional income, and it does not bind the reversioners (*h*).

181C. Alienation for legal necessity by one widow without consent of other widows.—If a Hindu dies leaving two widows they succeed as joint tenants with a right of survivorship, but they can partition the property so that each may separately enjoy an equal share of the *income* [s. 43, no. 4, note (4)].

If they act together, they can alienate the corpus of the estate for debts contracted for necessity, but one of them cannot prejudice the right of survivorship of the other by alienations, even though for a legal necessity, save by the consent of the other, or possibly save where that consent has been applied for and unreasonably withheld. The mere fact that a partition has taken place between them does not imply a right to prejudice the claims of the survivor (*i*). The arrangement between the two widows may be of such a character that each may relinquish her right of survivorship as to the portions of the estate held by the other. In such a case the alienation (with or without legal necessity and without the consent of the other) cannot be questioned by the other but it will not bind the reversioners (*j*).

(*f*) *Udai Dat* v. *Ambika Prasad* (1927) 2 Luck. 412, 414, 415, 100 I.C. 530, ('27) A.O .110.

(*g*) *Karimuddin* v. *Govind Krishna* (1909) 31 All. 497, 36 I.A. 138, 3 I.C. 795; *Debi Dayal* v. *Bhau Pertap* (1904) 31 Cal. 433; *Jagdat Singh* v. *Rawat* (1929) 4 Luck. 26, 112 I.C. 238, ('29) A.O. 364; *Maniklal* v. *Kisni* (1941) Nagpur, 135, 192 I.C. 798, ('41) A.N. 28; *Suraj Prasad* v. *Makhna Devi* (1945) All. 465.

(*h*) *Hurry* v. *Gonesh* (1884) 10 Cal. 823; *Gunap* v. *Subbi* (1908) 32 Bom. 577; *Makhan* v. *Gayan* (1911) 33 All. 255, 9 I.C. 199, *supra*. In *Dayamani* v. *Srinibash* (1906) 33 Cal. 842, the circumstances were special.

(*i*) *Gajapati* v. *Pusapati* (1892) 19 I.A. 184, 16 Mad. 1; *Gauri Nath* v. *Gaya Kuar* (1928) 55 I.A. 399, 111 I.C. 485, ('28) A. PC. 251, overruling *Jai Narain* v. *Munna Lal* (1928) 50 All. 489, 107 I.C. 699, ('28) A.A. 92. See also *Vallura* v. *Sasapu* (1925) 49 Mad. L. J. 479, 90 I.C. 881, ('26) A.M. 6; *Krishna Pratap Singh* v. *Prembada Kunwar* (1932) All. 708, 203 I.C. 97, ('42) A.A. 365 (1942) A.L.J. 487.

(*j*) *Dulhin Parbati Kuer* v. *Baijnath Prasad* (1935) 14 Pat. 518, 155 I.C. 213, ('36) A.A. 300; *Ammani Amma* v. *Periasami Udayar* (1923) 45 Mad. L.J. 1, 74 I.C. 58.

Ss. 181C-182

A Hindu dies leaving two widows *A* and *B*, and leaving two properties *X* and *Y*. The widows divide the properties so that *A* obtains possession of property *X*, and *B* of property *Y*. *A* afterwards mortgages property *X* for debts contracted by her for a legal necessity, and puts the mortgagee in possession. On *A*'s death, *B* is entitled to possession of property *X* from the mortgagee.

The same principles apply to two or more daughters (*k*).

181D. Alienation by widow may be by way of mortgage or sale.—Where a case of necessity exists, the widow or other limited heir is not bound to raise money on her personal security. She may sell the property or mortgage it. She is not bound to mortgage it, if a mortgage would be more prejudicial to her than a sale by reducing her income to a greater extent (*l*). Even if a mortgage would have been more beneficial than a sale, still if she and the purchaser are both acting honestly, the sale cannot be set aside on the ground solely that she ought to have mortgaged and not sold (*m*). If the property has been mortgaged, but the income of the property is not sufficient to pay the interest on the mortgage-debt, she may sell the property even before the debt is due, if in the circumstances this is a proper, though not a necessary, course to take. " A widow, like a manager of a family, must be allowed a reasonable latitude in the exercise of her powers, provided, she acts fairly to her expectant heirs " (*n*).

182. Burden of proof of necessity.—Those who deal with a person who has only a limited interest in the property and who proposes to dispose of a larger interest, are *prima facie* bound to make out the facts which authorize such a disposition. The power of a widow or other limited heir to sell or mortgage the estate inherited by her is a limited and qualified power. She is at perfect liberty to dispose of her own life-interest in the estate, but if she proposes to alienate the *corpus* of the estate either by way of sale or mortgage, the purchaser or mortgagee is bound to inquire into the necessity for the sale or mortgage. If the sale or mortgage is impeached, the burden lies on him to prove—

(a) *either* that there was legal necessity in fact; (*o*) *or*

(*k*) *Yelumal Chetty* v. *Natesachari* (1945) Mad. 35.

(*l*) *Singam* v. *Draupadi* (1908) 31 Mad. 153; *Bal Krishna* v. *Hira Lal* (1919) 41 All. 338, 345. 50 I.C. 74, ('19) A.A. 406.

(*m*) *Phoolchand* v. *Rughoobuns* (1869) 9 W.R. 108; *Nabakumar* v. *Bhabasundari* (1867) 3 Ben. L.R. (A.C.J.) 375.

(*n*) *Venkaji* v. *Vishnu* (1894) 18 Bom. 534, 536. See also *Niamat Rai* v. *Din Dayal* (1927) 54 I.A. 211, 8 Lah. 597, 101 I.C. 373, ('27) A.PC. 121 [powers of manager].

(*o*) *Bajrang Singh* v. *Gobindprasad* (1936) 11 Luck. 11, 154 I.C. 841, ('35) A.O. 373.

(b) that he made proper and *bona fide* inquiry as to the existence of the necessity, and did all that was reasonable to satisfy himself as to the existence of the necessity (*p*). S. 182

If he proves that there was a necessity in fact, the alienation will be upheld, even though the necessity was brought about by the mismanagement of the limited heir (*q*), unless it be shown that he himself contributed to the mismanagement.

Even if he fails to prove that there was a necessity in fact, the alienation will be upheld, if he proves that he made such inquiry as aforesaid, and that the facts represented to him were such as, if true, would have justified the transaction [ill. (1)].

In no case, however, is he bound to see that the money paid by him is applied to meet the necessity. The reason is that he can rarely have the means of controlling the actual application, unless he himself enters on the management (*r*).

The same rule applies to a transferee from an alienee (*s*) [ill. (2)].

Illustrations.

(1) *A*, a Hindu widow, whose husband has left collateral heirs (reversioners) alleging that the property held by her as such is insufficient for her maintenance, agrees to sell a field, part of such property, to *B*. *B* satisfies himself by honest and reasonable enquiry that the income of the property is not sufficient for *A*'s maintenance and that the sale of the field is necessary, and acting in good faith, buys the field from *A*. The sale is binding not only on the widow, but on the reversioners, even if it turns out that there was no necessity in fact to sell the property. See the Transfer of Property Act, 1882, s. 38, and s. 244 below.

(2) A Hindu governed by the Madras school of Hindu law dies leaving a daughter and her [daughter's] son. The daughter succeeds to his property for a woman's estate, Litigation ensues in respect of the estate between the daughter and a grandnephew *M* of the deceased. A compromise is arrived at between the daughter and *M* whereby the estate of the deceased is divided equally between them. *M* knew that he had no honest claim to the estate. *M* then mortgages the property that came to his share to *K*, the mortgage deed stating that the property had been transferred to *M* under the compromise. The daughter's son sues *M* and *K* for a declaration that the compromise and the mortgage are not binding on him. The compromise between the daughter and *M* is set aside as not binding on the daughter's son. Is *K* in any better position than *M*? The Judicial Committee has held that he is not. *K* had notice that *M* took from

(*p*) *Ramanand Lal* v. *Damodar Das* (1941) All. 820, 199, I.C. 369, ('42) A.A. 110, (1942) A.L.J. 94.

(*q*) *Rai Rajeshwar Bali* v. *Har Kishen Bali* (1933) 8 Luck. 538, 150 I.C. 316, ('33) A.O. 170.

(*r*) *Hunooman Persaud* v. *Mussamat Babooee* (1856) 6 M.I.A. 393; *Cavaly Vencata* v. *Collector of Masulipatam* (1867) 11 M.I.A. 619; *Kameswar Pershad* v. *Run Bahadoor* (1881) 6 Cal. 843, 8 I.A. 8; *Hurro Nath* v. *Randhir Singh* (1891) 18 Cal. 311, 18 I.A. 1; *Amarnath* v. *Achan Kuar* (1892) 14 All. 420, 19 I.A. 196; *Maheshar* v. *Ratan Singh* (1896) 23 Cal. 766, 23 I.A. 57; *Sham Sunder* v. *Achhan Kunwar* (1899) 21 All. 71, 25 I.A. 183; *Dharamchand* v. *Bhawani* (1898) 25 Cal. 189, 24 I.A. 183; *Bhagwat Dayal* v. *Debi Dayal* (1908) 35 Cal. 420, 35 I.A. 48; *Ghansham Singh* v. *Badiya Lal* (1902) 24 All. 547.

(*s*) *Obala Kondama* v. *Kandasami* (1924) 51 I.A. 145, 47 Mad. 181, 79 I.C. 961, ('24) A.PC. 56.

S. 182 one who was a limited heir, and he was therefore bound to inquire whether the compromise was valid, but he had failed to do so. "Here there is no proof either of necessity or of inquiry validating the compromise." The mortgage to *K* also was therefore held not to be binding on the daughter's son. The provisions of ss. 89 and 96 of the Indian Trusts Act, 1882, do not apply to such a case: *Obala Kondama* v. *Kandasami* (1924) 51 I.A. 145, 47 Mad. 181, 79 I.C. 961, ('24) A.PC. 56.

What the alienee must prove.—"One who claims title under a conveyance from a woman, with the usual limited interest which a woman takes, and who seeks to enforce that title against reversioners, is always subject to the burden of proving not only the genuineness of his conveyance, but the full comprehension by the limited owner of the nature of the alienation she was making, and also that the alienation was justified by necessity, or at least that the alienee did all that was reasonable to satisfy himself of the existence of such necessity" (*t*). "In order to sustain an alienation by a Hindu widow of the *corpus* of her husband's estate, it must be shown, either that there was legal necessity for the alienation, or, at least, that the grantee was led on reasonable grounds to believe that there was" (*u*). Lapse of time does not affect the question of onus of proof regarding necessity except in so far as it might give rise to a presumption of acquiescence, or save the alienee from adverse inferences arising from the scanty proof which might be offered on his behalf (*v*).

Recitals of necessity.—Recitals in mortgages or deeds of sale of the existence of necessity are admissible in evidence (*w*), but they are not evidence by themselves of the act (*x*). To substantiate the allegation of the existence of necessity there must be some evidence *aliunde* (*y*). The reason is that the alienee, to protect his interest, may get false recitals to be made (*z*). But when by efflux1on of time evidence independent of the recitals becomes unavailable, a recital of necessity, consistent with probability and the circumstances, assumes greater importance; it is clear evidence of a representation to the purchaser, and, when evidence of actual inquiry by him has become impossible, the recital, coupled with circumstances which justify a reasonable belief that an inquiry would have confirmed its truth, is sufficient evidence to support the deed (*a*).

The absence of a recital of necessity in a deed of sale does not vitiate the sale. The necessity may be proved by other evidence (*b*).

Lapse of time.—Where a long period (82 years) has elapsed since the sale took place, it is not reasonable to expect such full and detailed evidence of the circumstances which gave rise to the sale as in the case of an alienation at a more recent date, and presumptions are permissible to fili in the details which have been obliterated by time (*c*).

(*t*) *Bhagwat Dayal* v *Devi Dayal* (1908) 35 Cal. 420, 35 I.A. 48, 57-58.

(*u*) *Amarnath* v. *Achan Kuar* (1892) 14 All. 420, 429, 19 I.A. 196, 202.

(*v*) *Raraneshwar* v. *Chandi Prasad* (1911) 38 Cal. 721, 12 I.C. 931, affmd. (1915) 43 Cal. 417, 36 I.C. 499, ('15) A.PC. 57.

(*w*) *Banga Chandra* v. *Jagat Kishore* (1915) 43 I.A. 249, 44 Cal. 186, 36 I.C. 420, ('16) A.PC. 110; *Darbari Lal* v. *Gobind* (1924) 46 All. 822, 826, 80 I.C. 31, ('24) A.A. 902.

(*x*) *Bednath* v. *Rani Rajeshwari Devi* (1938) 13 Luck. 357, 168 I. C. 725, ('37) A. O. 406.

(*y*) *Brij Lal* v. *Indar Kunwar* (1914) 36 All. 187, 23 I.C. 715, ('14) A.PC. 38; *Biswanath* v. *Kayastha Trading Corporation* (1929) 8 Pat. 450, 119 I.C. 405, ('29) A.P. 422; *Rajlakhi Debia* v. *Gokul Chandra* (1869) 13 M. I.A. 209, 3 Beng. L.R. (P.C.) 57. See also *Vasonji* v. *Chanda Bibi* (1915) 37 All. 369, 376, 29 I.C. 781, ('15) A.PC. 18; *Debendranath Sarma* v. *Nagendranath Dutt* (1933) 60 Cal. 1158, 149 I.C. 522, ('33) A.C. 900.

(*z*) *Muhammad* v. *Brij Bihari* (1924) 46 All. 656, 82 I.C. 5, ('24) A.A. 939.

(*a*) *Banga Chandra* v. *Jagat Kishore* (1916) 43 I.A. 249, 44 Cal. 186, 36 I.C. 420, (16) A.PC. 110; *Ram Narain* v. *Nandrani* (1928) 50 All. 823, 114 I.C. 868, ('29) A.A. 128; *Thakar Singh* v. *Mst. Uttam* (19) 10 Lah. 613, 118 I.C. 449, ('29) A.L. 295 *Rai Rajeshwar Bali* v. *Har Kishen Bali* (1933) 8 Luck. 538, 150 I.C. 346, ('33) A.O. 170.

(*b*) *Womesh Chunder* v. *Digumbure* (186) 3 W. R. 154.

(*c*) *Chintamanibhatla* v. *Rani of Wadhwan* (1920) 47 I.A. 6, 43 Mad. 541, 55 I.C. 538, ('20) A.PC. 64; *Raraneswar* v. *Chandi Prasad* (1916) 43 Cal. 417, 36 I.C. 499, ('15) A.PC 57 affmg. (1911) 38 Cal. 721, 12 I.C. 931; *Ram Narain* v. *Nandrani* (1928) 50 All. 823, 114 I.C. 868, ('29) A.A. 128; *Thakar Singh* v. *Mst. Uttam* (1929) 10 Lah. 613, 118 I.C. 449, ('29) A. L. 295; *Piari Lal* v. *Sundar Singh* (1922) 44 All. 756, 68 I.C. 805, ('22) A.A. 436; *Babulal* v. *Manik Lal* (1941) Nagpur 124, 192 I.C. 826, ('41) A.N. 79.

Rate of interest:—See notes to s. 244 under the same head.

Burden of proof: "Consent decree" involving alienation to mortgagee.—It has been held by a Full Bench of the Madras High Court that where a widow who has mortgaged her husband's property is sued by the mortgagee, and the suit is compromised by a transfer of the property by the widow absolutely in consideration of the mortgage debt, the burden of proving that the compromise was valid and binding on the reversioners is on the mortgagee purchaser (*d*). In a recent Privy Council case a widow sued upon a mortgage executed to her husband and obtained a decree for sale. She then purchased with the leave of Court some of the mortgaged properties at the auction-sale. The mortgagors filed a petition in objection to the sale. The widow then entered into a compromise with the mortgagors. The High Court of Patna held that the burden was on the reversioners impeaching the compromise to show that the compromise was not binding on them. Their Lordships of the Privy Council said: "Their Lordships do not find it necessary to consider whether the judgment of the High Court, in so far as it places the burden of proof upon the present appellants [reversioners], is absolutely and without qualification sound" (*e*). See also ill. (2) above.

183. Alienation by widow with consent of reversioners, that is, for presumptive legal necessity.—(*1*) When the alienation of the *whole* or *part* of the estate by a Hindu widow or other limited heir is to be supported on the ground of legal necessity, then if such necessity is not proved *aliunde* and the alienee does not prove inquiry on his part and honest belief in the necessity, the consent of such reversioners as may fairly be expected to be interested to dispute the transaction will be held to afford a presumptive proof which, if not rebutted by contrary proof, will validate the transaction as a right and proper one (*f*).

Mere consent of the next reversioner does not validate an alienation; it is only of evidential value. It is no conclusive proof of the existence of legal necessity. It raises a presumption of the existence of legal necessity. As the matter rests in presumption only, the actual reversioner at the widow's death is not precluded from questioning the alienation, but the burden lies upon him to show that there was no legal necessity for the

(*d*) *Tirupatiraju* v. *Venkayya* (1922) 45 Mad. 504, 57 I.C. 479, ('22) A.M. 131 [F.B.].

(*e*) *Ramsumran Prosad* v. *Shyam Kumari* (1926) 49 I.A. 342, 349-3°0, 1 Pat. 741, 749, 29 I.C. 71, ('22) A. PC. 356.

(*f*) *Rangasami* v. *Nachiappa* (1919) 46 I. A. 72, 42 Mad. 523, 50 I.C. 498, ('18) A.PC. 196; *Bajrangi Singh* v. *Manokarnika* (1908) 30 All. 1, 35 I.A. 1, overruling *Ramphal Rai* v. *Tula* (1884) 6 All. 116; *Debi Prosad* v. *Golap Bhagat* (1913) 40 Cal. 721, 19 I.C. 273 [F.B.]; *Vinayak* v. *Govind* (1901) 25 Bom. 129; *Pilu* v. *Babaji* (1910) 34 Bom. 165, 4 I.C. 584; *Ramkrishna* v. *Tripurabai* (1911) 13 Bom. L. R. 940, 12 I.C. 529; *Bijoy Gopal* v. *Girindra Nath* (1914) 41 Cal. 793, 805, 23 I.C. 162, ('14) A.PC. 128, *Moti* v. *Laldas* (1917) 41 Bom. 93, 37 I.C. 945, ('16) A. B. 85; *Ghisiawan* v. *Mussammat Raj Kumari* (1921) 43 All. 534, 63 I.C. 556, ('21) A.A. 33 [presumption rebutted]; *Bhup Singh* v. *Jhamman Singh* (1921) 44 All. 95, 64 I.C. 630, ('22) A.A. 169; *Darbari Lal* v. *Gobind* (1924) 46 All. 822, 80 I.C. 31, ('24) A.A. 902 [presumption not rebutted]; *Mahammad Sa'id* v. *Kunwar Darshan* (1928) 50 All. 75, 103 I.C. 116, ('27) A.A. 835; *Ramamurthy* v. *Bhimasankararao* (1938) Mad. 688, 178 I.C. 784, ('38) A.C. 433; *Allah Diya* v. *Sona Devi* (1942), All. 745, 204 I.C. 133, ('42) A.A. 331 (1942) A.L.J. 443.

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alienation (ill. (a)] (*g*). When he adduces no evidence to rebut the presumption he must fail (*h*). The mere fact that the consent was given for a consideration does not negative the presumption (*i*). If the consenting reversioner himself is the actual reversioner, he will be precluded by his consent from questioning the alienation [sec. 191] unless he can show that his consent was obtained by misrepresentation of the facts (*j*). When the presumption, that the alienation was justified by legal necessity, had been displaced, there is no presumption that any of the items constituting the consideration were justified by legal necessity and the onus of proving legal necessity for any item is on the alienee (*k*).

Where an alienation is made without the consent of the next reversioner, the burden lies on the *alienee* to show that the transaction was one for legal necessity [s. 182].

(2) The quantum of consent necessary to raise this presumption depends upon the facts of each particular case. Ordinarily the consent of the whole body of persons constituting the next reversion should be obtained, though there may be cases in which special circumstances may render the strict enforcement of this rule impossible. In any case, there should be such a concurrence of the members of the family as suffices to raise a presumption that the transaction is a fair one and one justified by Hindu law. The consent may be given at the time of alienation or it may be given even after alienation (*l*) [ill. (c)].

The consent to be of any effect must be given with full knowledge of the circumstances (*m*) and of the effect of the transaction and with an intelligent intention to consent to such effect. Mere attestation of a deed does not necessarily import consent to an alienation effected by it (*n*).

(*g*) *Mahammad Said* v. *Kunwar Durshan* (1928) 50 All. 75, 103 I.C. 116, ('27) A.A. 835, 178 I.C. 784, ('38) A. C. 433; *Ramamurthy* v. *Bhimasankararao* (1938) Mad. 688.

(*h*) *Rai Bajrang Bahadur Singh* v. *Rameshar Bux Singh* (1937) 12 Luck. 684, 166 I.C. 113, ('37) A. O. 189.

(*i*) *Bajrangi Singh* v. *Manokarnika* (1907) 30 All. 1, 35 I.A. 1; *Ambika Prasad* v. *Chandramani* (1929) 8 Pat. 396, 117 I.C. 867, ('29) A.P. 289.

(*j*) *Harendra Nath Mukherji* v. *Hari Pada Mukherji* (1938) 2 Cal. 492.

(*k*) *Indarjit Singh* v. *Jaddu* (1933) 55 All. 157 144 I.C. 108, ('33) A.A. 169.

(*l*) (1907) 30 All. 1, 35 I.A. 1, *supra*; approving *Radha Shyam* v. *Joya Ram* (1890) 17 Cal. 896; *Raj Lukhee Dabe* v. *Gokoo Chundar* (1869) 13 M.I.A. 209, 3 Beng. L.R. (P.C.) 57; *Sham Sunder Lal* v. *Achhan Kunwar* (1898) 21 All. 71, 25 I.A. 183; (1914) 41 Cal. 793, 23 I.C. 162, ('14) A. PC. 128, *supra*; (1913) 40 Cal. 721, 19 I.C. 273, *supra*.

(*m*) *Harendra Nath Mukherji* v. *Hari Pada Mukherji* (1938) 2 Cal. 492.

(*n*) *Sham Sunder* v. *Acchhan Kunwar* (1898) 25 I.A. 183, 189, 21 All. 71, 80; *Hari Kishen* v. *Kashi Pershad* (1914) 42 I.A. 64, 42 Cal. 876, 27 I.C. 674, ('14) A. PC. 90; *Durga Chandra* v. *Jagat Kishore* (1916) 43 I.A. 240, 255, 44 Cal. 186, 199, 36 I.C. 420, ('16) A. PC. 110; *Thakur Prasad* v. *Musammat Dipa Kuer* (1931) 10 Pat. 352, 362, 134 I.C. 129, ('31) A.P. 442; *Har Mitra* v. *Raghubar* (1928) 3 Luck. 645, 110 I.C. 618, ('28) A.O. 342.

The "next" reversioners referred to above are persons who would be entitled to succeed to the estate of the last full owner if the widow had died at the moment of the alienation. They are also called "next presumptive reversioners" or "immediate" reversioners. The more remote reversioners are called in some cases "contingent," in some cases "subsequent," and in some cases "distant" reversioners. **S. 183**

Where the next reversioner is a female, as, for instance, a daughter, her consent alone is not sufficient to validate an alienation, whether she takes a limited estate (*o*), or an absolute estate as in Bombay (*p*). In such a case the consent both of the *female* reversioner and the immediate *male* reversioner is necessary to validate the alienation (*q*) [ill. (b)]. But though her consent alone would not validate the transaction so as to bind the reversion, it would preclude her from impugning the validity of the alienation on the principle stated in sec. 191 (*r*).

The consent of a *female* reversioner cannot be regarded as affording the slightest presumption that the alienation was a justifiable one. The reason is that by Hindu law all women are supposed to be in a state of dependence (*s*). An alienation with the consent of a female reversioner and a *distant* male reversioner will not bind the *immediate* male reversioner (*t*).

(*3*) An alienation made with the consent of reversioners may be of the whole or of a part of the estate; it need not be of the whole estate (*u*).

Prior to the decision of the Privy Council in *Rangaswami*'s case (*v*), it was held by the High Court of Madras that, where an alienation made by a widow is sought to be supported on the sole ground that it was made with the consent of the next reversioners, the alienation must be of the *whole* of the property inherited by her and that an alienation of a portion only of the property is not valid (*w*). On the other hand, it was held by the High Courts of Calcutta (*x*) and Bombay (*y*), that a valid alienation may be made *even of a portion* of the property. The Privy Council has rejected the Madras view, and held that the alienation may be *partial*.

(*4*) The alienation must be one for consideration, *e.g.*, a sale, a mortgage or a lease (*z*). Except in the cases mentioned in sec. 179, sec. 181A (*2*) (iii), and sec. 181B (*2*) (v), a *gift* by a widow or other limited heir of the whole or any part

(*o*) *Bepin Behari* v. *Durga Charan* (1908) 35 Cal. 1086; *Kooer Goolab Singh* v. *Rao Kurun Singh* (1871) 14 M.I.A. 176.

(*p*) *Varjivan* v. *Ghelji* (1881) 5 Bom. 563 (daughter); *Vinayak* v. *Govind* (1901) 25 Bom. 129, 134-135 (sister); *Pilu* v. *Babaji* (1909) 34 Bom. 165, 4 I.C. 584 (daughter). But see *Malik Saheb* v. *Malik Arjunappa* (1914) 38 Bom. 224, 22 I.C. 292, ('14) A.B. 187, where it was assumed that a daughter's consent was sufficient.

(*q*) (1881) 5 Bom. 563, *supra*; (1901) 25 Bom. 129, 134-135, *supra*.

(*r*) *Akkawa* v. *Sayadkhan* (1927) 51 Bom. 475, 102 I.C. 232, ('27) A.B. 260.

(*s*) 5 Bom. 563, at p. 571, *supra*.

(*t*) *Muhammad* v. *Brij Bihari* (1924) 46 All. 656, 82 I. C. 5, ('24) A.A. 939.

(*u*) *Rangasami* v. *Nachiappa* (1919) 46 I.A. 72, 81-84, 42 Mad. 523, 533-536, 50 I.C. 498, ('18) A. PC. 196.

(*v*) (1919) 46 I.A. 72, 42 Mad. 523, 50 I.C. 498, ('18) A.PC. 196, *supra*.

(*w*) *Muthuveeru* v. *Vythilinga* (1909) 32 Mad 206, 3 I. C. 476; *Marudamuthu* v. *Shrinivasa* (1898) 21 Mad. 128.

(*x*) *Pulin Chandra* v. *Bolai Mandal* (1908) 35 Cal. 939.

(*y*) See *Vinayak* v. *Govind* (1901) 25 Bom. 129, where a sale of a portion only was upheld.

(*z*) *Bijoy Gopal* v. *Girindranath* (1914) 41 Cal. 793 [P.C.], 23 I.C. 162, ('14) A.PC. 128 [lease for 60 years held valid].

S. 183 of the estate inherited by her to a *third person* (that is, a person other than the next reversioner), is not binding on the actual reversioner, even if made with the consent of the next reversioner. The consent of the next reversioner, though it affords good evidence of legal necessity in the case of an alienation *for consideration*, cannot possibly afford such evidence in the case of a *gift*, there being no room for the theory of legal necessity in the case of a gift (*a*).

A gift of the *entire* estate *to the next reversioner or reversioners* amounts to a surrender, and is good on that ground [s. 197]. But a gift, though it be of the entire estate, to some only of several reversioners without the consent of the rest (*b*), or a gift of part of the estate though it be in favour of the whole body of reversioners (*c*), does not amount to a surrender. It is a gift pure and simple, and it cannot be supported as an alienation under this section (*d*). It stands on the same footing as a gift to a stranger, and it may be avoided by the actual reversioner at the widow's death.

A deed of gift of *part* of the estate in favour of the next reversioner where there is only one such, followed by a deed of sale by him of that part to a third party, may be supported as an "alienation with the consent of the next reversioner" under this section, if the two documents are so connected as to form one transaction, that is, a transaction of sale (*e*). A conveyance of the whole estate by a widow and the next reversioner jointly to a stranger is valid but an alienation by a widow to a stranger and the next reversioner is not valid, especially if the reversioner is a minor (*f*).

The High Court of Calcutta has held that a gift of the *entire* estate by a widow to a third person with the consent of the *whole body* of the next reversioners, may be supported as a surrender under sec. 197 ; such a gift, in the view of that

(*a*) *Rangaswami* v. *Nachiappa* (1919) 46 I.A. 72, 85, 42 Mad. 523, 537, 50 I.C. 498, ('18) A.PC. 196 ; *Pilu* v. *Babaji* (1909) 34 Bom. 165, 4 I. C. 584 ; *Bakhtawar* v. *Bhagwana* (1910) 32 All. 176, 5 I.C. 270 ; *Abdulla* v. *Ram Lal* (1912) 34 All. 129, 12 I.C. 129 ; *Khawani Singh* v. *Chet Ram* (1917) 39 All. 1, 37 I.C. 86, ('17) A.A. 341 ; *Harihar* v. *Udainath* (1923) 45 All. 260, 74 I.C. 113, ('23) A.A. 190 [next reversioner an insolvent—gift made to his son with his consent—gift held bad—creditor's claim upheld] ; *Bindeshwari* v. *Har Narain* (1929) 4 Luck. 622, 127 I.C. 20, ('29) A.O. 185.

(*b*) *Khawani Singh* v. *Chet Ram* (1917) 39 All. 1, 37 I.C. 86, ('17) A.A. 341 ; *Raghunandan Singh* v. *Tulsi Singh* (1924) 46 All. 38, 75 I.C. 244, ('24) A.A. 315.

(*c*) *Pilu* v. *Babaji* (1909) 34 Bom. 165, 4 I.C. 584.

(*d*) See (1919) 46 I.A. 72, 42 Mad. 523, 50 I.C. 498, ('18) A.PC. 196, *supra*.

(*e*) *Muhammad Sa'id* v. *Kunwar Darshan* (1928) 50 All. 75, 103 I.C. 116, ('27) A.A. 835.

(*f*) *Bala* v. *Baya* (1936) 60 Bom. 211, 38 Bom. L. R. 1087, 166 I.C. 771, ('37) A.B. 43.

Court, amounts in effect to two transactions, namely, (1) a surrender in favour of the next reversioners which would vest the estate in them, and (2) a gift by them of the estate to the third person (*g*). On the other hand, it has been held in Bombay that such a gift is not validated even if made with the consent of the whole body of the next reversioners, and that though it may be binding on the widow and the consenting reversioners, it is not binding on the actual reversioner on the widow's death nor on a son subsequently adopted by her (*h*). The question arose in a recent Privy Council case (*i*), but their Lordships expressed no opinion on it, the transaction having been set aside on the ground that the consent of the next reversioner was not proved. **S. 183**

(*5*) An alienation made by a widow without legal necessity and without the consent of the reversioners does not bind the reversioner (*j*); it binds only her interest in the property [s. 185].

In *Rangaswami* v. *Nachiappa* (*k*) a gift was made by a widow to the nearest reversioner who was the cousin of the last owner. The gift was only of a *portion* of the property. Their Lordships of the Privy Council held that the transaction being a *gift* it could not possibly be held to be evidence of an alienation for value for purposes of necessity so as to bind the actual reversioner. Nor could it be supported as a surrender [s. 197], for a surrender must be the whole estate, and the gift in that case was of part only of the estate.

Illustrations.

(a) A Hindu dies leaving a widow, three brothers, and a paternal uncle. He leaves three houses. The widow sells one of the houses to *X* with the consent of *all* the brothers. Here the brothers constitute the next reversion, while the uncle is a *remote* reversioner. The sale having been made with the consent of the brothers, it is binding on the whole reversion including the actual reversioner. The result is that if all the brothers die in the lifetime of the widow, and the uncle succeeds to the estate on the widow's death, the sale will bind him, though he was not a consenting party to it, unless he proves that there was no legal necessity for the sale and that the purchaser did not *bona fide* believe that there was such necessity. See sub-sec. (*1*).

(b) *A* dies leaving a widow, a daughter, a brother and a paternal uncle. The widow succeeds to the estate of *A* as his heir. She then sells the property with the consent of her daughter. After the death of the daughter and of the brother, the uncle disputes the sale. Here the consent having been given by a *female* reversioner, there is no presumption that the sale was for legal necessity. The burden, therefore, lies on the purchaser to show that the sale was for legal necessity, or that he had made proper and *bona fide* enquiries and had satisfied himself as to the existence of the necessity

(*g*) *Nobokishore* v. *Hari Nath* (1884) 10 Cal. 1102 [F. B.], explained in *Rangaswami* v. *Nachiappa* (1919) 46 I.A. 72, 80-81, 42 Mad. 523, 533, 50 I.C. 498, ('18) A.PC. 196.

(*h*) *Tukaram* v. *Yesu* (1931) 55 Bom. 46, 129 I.C. 591, ('31) A.B. 100.

(*i*) *Narayanaswami Ayyar* v. *Rama Ayyar* (1930) 57 I.A. 305, 53 Mad. 692, 128 I.C. 261, ('30) A.PC. 297.

(*j*) *Harendra Nath Mukherji* v. *Hari Pada Mukherji* (1938) 2 Cal. 492.

(*k*) (1919) 46 I.A. 72, 85, 42 Mad. 523, 537, 50 I.C. 498, ('18) A.PC. 196.

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But if *A*'s *brother* had consented to the sale, the burden would have been on the *uncle* to show that there was no legal necessity and that no such enquiries had been made by the purchaser. See sub-sec. (*2*).

(c) A Hindu dies leaving a widow and four male relations who are then the next reversioners. The widow, without the consent of the reversioners, executes several deeds of sale one after another of portions of her husband's estate to her son-in-law. Sometime afterwards all the reversioners pass a writing to the widow *ratifying* the sales to the son-in-law and agreeing not to dispute their validity. The sales are binding not only on the consenting reversioners, but also on the actual reversioners, unless it is shown by the actual reversioners that the transactions were not proper. It is immaterial that the consent was given *after* the execution of the deeds: *Bajarangi* v. *Manokarnika* (1908) 30 All. 1, 35 I.A. 1. See sub-sec. (*2*).

Similarly an alienation without legal necessity and with the consent of some of the reversioners does not bind other reversioners (*l*).

184. Effect of alienation made for legal necessity or with consent of next reversioner.—An alienation made by a widow or other limited heir of property inherited by her for justifying necessity, or with the consent of the next reversioners as stated in s. 183, passes an absolute estate in the property to the alienee. It is not only binding on her, but also on the reversioners, including reversioners subsequently born (*m*) or adopted (*n*).

185. Effect of alienation made without legal necessity and without consent of next reversioner.—(*1*) An alienation made by a widow or other limited heir of property inherited by her, without legal necessity and without the consent of the next reversioners is not binding on the reversioners, but it is nevertheless binding on her so as to pass her own interest [that is life-interest] to the alienee (*o*).

(*2*) Even as regards reversioners it is not absolutely void, but voidable at their option. They may affirm it, or treat it as a nullity without the intervention of a Court, and they show their election to do the latter by commencing an action to recover possession of the property (*p*). In such a case he is not entitled to mesne profits for a period before the exercise of the election (*q*). See s. 190.

(*l*) *Lakshmi Prasad Singh* v. *Kunai Singh* (1944) All. 484.

(*m*) *Vinayak* v. *Govind* (1901) 25 Bom. 129.

(*n*) *Rajkristo* v. *Kishoree* (1865) 3 W. R. C.R. 14; *Pilu* v. *Babaji* (1909) 34 Bom. 165, 4 I.C. 584; *Ramkrishna* v. *Tripurabai* (1911) 13 Bom. L.R. 940, 12 I.C. 529.

(*o*) *Ramchandra* v. *Bhimrav* (1877) 1 Bom. 577; *Chidambaramma* v. *Husainamma* (1916) 39 Mad. 565, 30 I.C. 101, ('16) A.M. 347; *Dhanji* v. *Dhuma* (1924) 26 Bom. L. R. 277, 80 I.C. 234, ('24) A.B. 382; *Gowardhandas* v. *Viru Mal* (1920) 1 Lah. 48, 55 I.C. 847, ('20) A.L. 397.

(*p*) *Bijoy Gopal* v. *Krishna* (1907) 34 Cal. 329, 34 I.A. 87; *Ramgouda* v. *Bhausaheb* (1927) 54 I.A. 396, 52 Bom. 1, 105 I.C. 708, ('27) A.PC. 227; *Kondama Naicker* v. *Kandasamy Goundar* (1924) 51 I.A. 145, 47 Mad. 181, 79 I.C. 961, ('24) A.PC. 56. In *Modhu Sudan* v. *Rooke* (1897) 25 Cal. 1, the alienation was affirmed.

(*q*) *Mohanlal* v. *Jagjiwan* (1938) Bom. 292, 40 Bom. L. R. 394, 176 I. C. 76, ('38) A. B. 298.

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185A. Persons entitled to impeach unauthorized alienations.—The persons entitled to impeach unauthorized alienations by a widow or other limited heir are obviously the next reversioners. It is not the law, however, that reversioners alone can impeach such alienations. Any person who has an interest in the succession is entitled to impeach them, *e.g.*, the Crown taking by escheat (*r*) [s. 176]. But a stranger to the reversion, *e.g.*, a mortgagee from a widow, cannot impeach them (*s*). As to suits by reversioners, see sec. 207.

Illustrations.

A Hindu widow mortgages a house forming part of her husband's estate to *M* (who is not a reversioner). She then conveys the house by way of gift to *G*. After the widow's death, *G* sues *M* for redemption. *M* contends that the gift is invalid [s. 183(4)], and that *G* is not therefore entitled to redeem. Is *M* entitled to challenge the gift? No, because he is a stranger to the reversion: *Sitaram* v. *Khandu* (1921) 45 Bom. 105, 59 I.C. 480, ('21) A.B. 413.

As to the remedies of reversioners in cases of unauthorised alienations, see s. 205 below. As to limitation, see ss. 208-209.

Escheat.—Even if there be no reversioners, a widow or other limited heir cannot alienate property inherited by her without legal necessity. Such an alienation will not bind the Crown where the Crown is entitled to the property by escheat in default of reversioners (*t*).

Tenant dying without heir.—A landlord to whom the holding of a tenant reverts on the tenant's death without leaving heirs is entitled to challenge an unauthorized alienation made by the tenant, where the tenant is a Hindu widow or other limited heir (*u*).

186. Lease by widow.—A widow or other limited heir may in the exercise of her power of management [s. 198] grant leases of properties belonging to the estate. But she has no power to grant a permanent lease or a lease for a long term so as to bind the reversion, unless it is justified by legal necessity (*v*), or it is for the benefit of the estate (*w*), or made with the consent of the next reversioners (*x*). Apart from such necessity, benefit or consent, to create a new and fixed rent for all time, though such rent be adequate at the

(*r*) *Thakur Prasad* v. *Musammat Dipa Kuer* (1931) 10 Pat. 352, 359-362, 134 I.C. 129, ('31) A. P. 442; *Maharaja Kesho Prasad* v. *Chandrika* (1923) 2 Pat. 217, 228, 68 I.C. 394, ('23) A.P. 122; *Sitaram* v. *Khandu* (1921) 45 Bom. 105, 59 I.C. 480, ('21) A.B. 413; *Jhari* v. *Bijai* (1923) 45 All. 613, 616, 74 I.C. 865, ('24) A.A. 109.

(*s*) *Sitaram* v. *Khandu*, *supra*; *Bipat Mahton* v. *Kulpat Mahton* (1934) 13 Pat. 182, 153 I.C. 439, ('34) A.P. 498; *Ajodhia Prasad* v. *Mt. Sunjhari Kuer* (1931) 6 Luck. 710, 139 I.C. 631, ('32) A.O. 342.

(*t*) *Collector of Masulipatam* v. *Cavaly Vencata* (1861) 8 M.I.A. 529; *Kundan* v. *Secretary of State* (1926) 7 Lah. 543, 96 I.C. 865, ('26) A. L. 673.

(*u*) *Prasad Nath* v. *Ambica Prasad* (1930) 9 Pat. 515, 117 I.C. 630, ('30) A.P. 407.

(*v*) *Sankar Nath* v. *Bejoy Gopal* (1908) 13 C.W.N. 201 [lease for 60 years]; *Bijoy Gopal* v. *Girindranath* (1914) 41 Cal. 793, 23 I.C. 162, ('18) A.PC. 128 [lease for 60 years]; *Nabakishore* v. *Upendrakishore* (1923) 37 Cal. L.J. 319, 74 I.C. 612, ('23) A.C. 563.

(*w*) *Bijoy Gopal* v. *Girindranath*, supra [lease for 60 years].

(*x*) (1914) 41 Cal. 793, 23 I.C. 162, ('18) A. PC. 128, *supra*; (1908) 13 C.W.N. 201, *supra*; *Upendra Nath* v. *Bindesri* (1915) 20 C.W.N. 210, 32 I.C. 468, ('16) A.C. 843; *Dayamani* v. *Srinibash* (1906) 33 Cal. 842 [permanent lease].

Ss. 186-188

time of fixing it, in lieu of giving the estate the benefit of an augmentation of a variable rent from time to time, is a breach of duty on the part of the widow (*y*). Such a lease, however, is not void, but voidable at the option of the reversioners. It does not come to an end at the death of the widow; it is valid until it is set aside (*z*). A permanent lease is not justified even if it is granted to improve the land. The expression "for the benefit of the estate" has reference to the preservation and protection of the estate, and not to its improvement (*a*). See s. 243A.

Raiyati settlement by a widow.—A widow may make a raiyati settlement provided the transaction is fair and *bona fide* (*b*).

If a widow is appointed as a Lumbardar then no co-sharer can challenge a lease of Khudkasta lands by her unless he can prove that it was not an act of ordinary village management. A reversioner is not in a better position (*c*).

187. Alienation by widow with leave of Court under the Indian Succession Act, 1925, s. 307.—Where a widow or other limited heir obtains letters of administration, and then obtains leave from the Court under s. 307 of the Indian Succession Act, 1925, to alienate the property, she can confer on the alienee an absolute title to the property irrespective of necessity or of the consent of reversioners. The reason is that the alienee is entitled to trust to the order of the Court and he is not bound to go behind it (*d*).

188. Equities on setting aside alienations by widow.—Where an alienation made by a widow or other limited heir without legal necessity, and without the consent of the next reversioners, is set aside, the question arises whether the alienation should be set aside in its entirety or upon terms and conditions. The following is the result of the decisions on the subject:—

(1) It has been held in Bombay that when a sale is set aside, the Court may direct, as a condition of setting aside the sale, the return of the purchase money if the money is still intact at the death of the widow (*e*). But see sub-sec. (*5*).

(*y*) *Shibessouree Debia* v. *Mothooranath Acharjo* (1869) 13 M.I.A. 270 [permanent lease by a Mohunt]; *Raghubir Singh* v. *Jethu* (1923) 2 Pat. 171, 70 I.C. 290, ('23) A.P. 130.

(*z*) *Modhu Sudan* v. *Rooke* (1897) 25 Cal. 1, 24 I.A. 164; *Bijoy Gopal* v. *Krishna* (1907) 34 Cal. 329, 34 I.A. 87; *Upendra Kishore* v. *Nobo Kishore* (1918) 23 C.W.N. 64, 48 I.C. 993, ('19) A. C. 746.

(*a*) *Ganap* v. *Subbi* (1908) 32 Bom. 577. The decision in *Dayamani* v. *Srinibash* (1906) 33 Cal. 842, turned on the special facts of the case.

(*b*) *Biswanath* v. *Ram Prasad* (1931) 10 Pat. 572, 133 I.C. 673, ('31) A.P. 389.

(*c*) *Ghasiram* v. *Girdhari* (1942) Nagpur 680, 195, I.C. 603 ('42) A. N. 306.

(*d*) *Kamikhya* v. *Hari Churn* (1899) 26 Cal. 607; *Annada* v. *Atul* (1919) 23 C.W.N. 1045, 54 I.C. 197; *Rajani Kanta* v. *The Secretary of State* (1919) 23 C.W.N. 652, 52 I.C. 309, ('19) A. C. 2.

(*e*) *Someshwar* v. *Someshwar* (1923) 47 Bom. 1, 67 I.C. 658, ('23) A.B. 16.

(2) It has been held by the Judicial Committee that where a Hindu widow *sells* property inherited by her from her husband, *without legal necessity*, and the purchaser believes in good faith that he is absolutely entitled thereto and makes any improvement in the property, the Court may in setting aside the sale direct the reversioner to pay to the purchaser the amount expended by him on such improvements as have enhanced the market value of the property (*f*). The case was one from Lahore where the Transfer of Property Act, 1882, does not apply, but the decision, it seems, would have been the same even if the case had been one under the Acts. See sub-sec. (*5*). S. 188

(3) The principle of the above decision was followed by the High Court of Bombay in a case of a *mortgage* by a widow without legal necessity (*g*), though in an earlier case the Court refused to allow the mortgagee even to remove the structure erected by him on the land after it was destroyed by floods (*h*). In Allahabad, it has been held that whether the case be one of mortgage (*i*), lease (*j*), or gift (*k*), if the transfer is not one for legal necessity, the transferee is not entitled to any compensation for the improvements made by him even if the improvements were such as have enhanced the market value of the property, the ground of the decision being that s. 51 of the Transfer of Property Act, 1882, does not apply to alienations made by a Hindu widow without legal necessity. That section, it has been said, " applies only to the case of a transferee of the immoveable property who makes any improvement in the property, believing in good faith that he is absolutely entitled thereto. But in the case of a Hindu widow a person dealing with her would ordinarily know that

(*f*) *Kidar Nath* v. *Mathu Mal* (1913) 40 Cal. 555, 18 I.C. 946 (P.C.) [cost of erection of temple not allowed but purchaser allowed to remove the materials]. See also *Raja Rai Bhagwat* v. *Ram Ratan* (1921) 20 All. L.J. 26, 65 I.C. 69, ('22) A.PC. 91 [P.C.], where there was partial necessity for the sale.

(*g*) *Shiddappa* v. *Pandurang* (1923) 47 Bom. 696, 72 I.C. 626, ('23) A.B. 385. But see *Ramappa* v. *Yellappa* (1928) 52 Bom. 307, 109 I.C. 532, ('28) A.B. 150.

(*h*) *Vrijbhukandas* v. *Dayaram* (1908) 32 Bom. 32.

(*i*) *Hansraj* v. *Musammat Somni* (1922) 44 All. 665, 67 I.C. 314, ('22) A.A. 194 [mortgagee allowed to remove structures].

(*j*) *Rajrup* v. *Gopi* (1925) 47 All. 430, 432, 87 I.C. 44, ('25) A.A. 201.

(*k*) *Raghunandan* v. *Tulsi Ram* (1924) 46 All. 38, 75 I.C. 244, ('24) A.A. 315.

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she has only a life-interest and he can reasonably be expected to make inquiries as to whether there was any legal necessity for the mortgage and whether the widow had any right to make the transfer. The mortgagee cannot be said here to have acted in good faith in dealing with such a widow so as to affect more than her life interest" (*l*). But see sub-sec. (*5*).

(4) The question whether an alienee from a Hindu widow is entitled to compensation for money spent upon the property cannot be raised in a declaratory suit by reversioners during the lifetime of the widow. It is premature to raise it in such a suit. It can only be raised after the widow's death in a suit by reversioners for possession (*m*).

(5) It has been recently held by the Judicial Committee that where a gift is made by a widow to a stranger of property inherited by her from her husband, and the donee sells the property, and the purchaser effects improvements believing in good faith that he was the owner, he is entitled, if the gift is set aside, to the alternative rights mentioned in sec. 51 of the Transfer of property Act, 1882, namely, to be paid by the plaintiff at whose instance the gift is set aside the value of the improvements, or to require the plaintiff to sell his interest in the property to him (*n*).

189. Purchase money applied by widow in part only to purposes of legal necessity.—Cases frequently arise in which property inherited by a widow from her husband is sold by her for legal necessity, but the whole of the price is not proved to have been *applied* to purposes of necessity, and the sale is challenged by the reversioners on that ground. In such cases, if the sale itself is justified by legal necessity, and the purchaser pays a fair price for the property sold, and acts in good faith and after due inquiry as to the necessity for the sale, the mere fact that part of the price is not proved to have been *applied* to purposes of necessity, would not invalidate the sale, the purchaser not being bound to see to the *application* of the price. If the above conditions are satisfied, the sale must be upheld unconditionally, whether the part not proved to have been applied to purposes of legal necessity is

(*l*) (1922) 44 All. 665, 667, 67 I.C. 314, ('22) A.A. 194, *supra*.

(*m*) *Rup Narain* v. *Gopal Devi* (1909) 36 Cal. 780, 36 I.A. 103, 3 I.C. 382.

(*n*) *Narayanaswami Ayyar* v. *Rama Ayyar* (1930) 57 I.A. 305, 53 Mad. 69, 128 I.C. 261, ('30) A.PC. 297.

considerable or small (*o*). It is wrong in such cases to draw a distinction, as was done by the Allahabad High Court, between the case where the part not proved to have been applied to purposes of necessity is considerable and the case where such part is small, and in the former case to pass a decree setting aside the sale conditionally upon the reversioner paying to the purchaser the part proved to have been applied to purposes of necessity and in the latter case to pass a decree upholding the sale conditionally upon the purchaser paying to the reversioners the price not proved to have been so applied (*p*). Where the sale was only partially justified by legal necessity, the sale may be set aside conditionally on the reversioner paying to the purchaser that portion of the consideration money which was justified by legal necessity (*q*). See sec. 245 and notes where the matter is fully discussed. **S. 189**

The underlying principle is that if the conditions stated in the section are complied with, the transaction is not vitiated by some excess of the widow's powers as rigorously construed.

The leading case on the subject of alienations for necessity is *Hanooman Persaud* v. *Mussamat Babooee* (*r*), decided by the Judicial Committee in 1856. The question in that case was as to the extent of the power of the mother as manager of the estate of her minor son to mortgage the estate. The principles laid down in that case [see note (1) to s. 242] have been applied also to alienations by a Hindu widow of property inherited by her from her husband and to alienations of joint family property by the manager of a joint Hindu family.

The law as stated in the present section was laid down by the Judicial Committee in *Suraj Bhan Singh* v. *Sah Chain Sukh* (*s*), following the decision of the same tribunal in *Krishna Das* v. *Nathu Ram* (*t*). The latter case was one of sale by the manager of a joint Hindu family, but the same principle applies to a sale by a widow.

(*o*) *Suraj Bhan Singh* v. *Sah Chain Sukh* (1928) 32 C.W.N. 117, 105 I.C. 257, ('27) A.PC. 244 [price Rs. 19,000—Rs. 1,622 not proved to have been applied to purposes of necessity—sale upheld unconditionally], following *Krishna Das* v. *Nathu Ram* (1927) 54 I.A. 79, 49 All. 149, 100 I.C. 130, ('27) A.PC. 37 [a case of sale by manager—price Rs. 3,500—Rs. 500 not proved to have been applied to purposes of necessity—sale upheld unconditionally]; *Ram Gopal Ghose* v. *Bullodeb Bose* (1864) W.R. (Sp. No.) 385 [one-third of the price not proved to have been applied to purposes of necessity—sale upheld unconditionally]; *Luchmeedhur Singh* v. *Ekbal Ali* (1867) 8 W.R. 75 [price Rs.65,000—Rs. 14,000 not proved to have been applied, etc.—sale upheld unconditionally]; *Chatranarayan* v. *Uba Kunwari* (1868) 5 Beng. L.R. 201 [price Rs. 995—Rs.321 not proved to have been applied, etc.—sale upheld unconditionally]; *Kamikaprasad* v. *Srimati* (1870) 5 Beng. L.R. 508 [sale upheld unconditionally]; *Felaram* v. *Bagalanand* (1910) 14 C.W.N. 895, 6 I.C. 207 [permanent lease on a selami of Rs.125—Rs. 25 not proved to have been applied, etc.—lease upheld unconditionally]; *Medai Dalavoi* v. *Nainar Teran* (1922) 27 C.W.N. 365, 74 I.C. 604, ('22) A.PC. 307 [price Rs.5,300—Rs. 712 not proved to have been applied, etc.—sale upheld unconditionally]; *Naman Lal* v. *Har Bhagwan* (1921) 2 Lah. 357, 66 I.C. 362, ('22) A.L. 317 [sale upheld unconditionally]; *Bal Krishna* v. *Hira Lal* (1919) 41 All. 338, 50 I.C. 74, ('19) A.A. 406 [price Rs. 19,500—Rs.11,725 not proved to have been applied, etc.—sale upheld unconditionally].

(*p*) *Jainarain* v. *Bhagwan* (1922) 44 All. 683, ('22) A.A. 321; *Sanmukh* v. *Jagarnath* (1924) 46 All. 531, 83 I.C. 838, ('24) A.A. 708; *Daulat* v. *Sankatha* (1925) 47 All. 355, 86 I.C. 91, ('25) A.A. 324; *Gobind Singh* v. *Baldeo Singh* (1903) 25 All. 330; *Ram Dei* v. *Abu Jafar* (1905) 27 All. 494; *Dwarka Ram* v. *Jhulai* (1923) 45 All. 429, 72 I.C. 134, ('23) A.A. 248; *Ramanand Lal* v. *Damodardas* (1941) All. 820, 199 I.C. 369, ('42) A.A. 110.

(*q*) *Shanti Kumar Pal* v. *Mukundlal Mandal* (1935) 62 Cal. 204, 156 I.C. 209, ('35) A.C. 20.

(*r*) (1856) 6 M.I.A. 393; *Tirbeni Sahai* v. *Ramsingh* (1938) 13 Luck. 230, 167 I.O. 925, ('37) A.O. 361.

(*s*) (1928) 32 C.W.N. 117, 105 I.C. 257, ('27) A.PC. 244.

(*t*) (1927) 54 I.A. 79, 48 All. 149, 100 I.C. 130, ('27) A.PC. 39.

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There is a series of cases decided by the Judicial Committee in which a small part of the price was proved to have been applied to purposes of legal necessity, and the sale was set aside on the ground that it was not substantially for legal necessity. The principles to be derived from these cases may be stated thus. If a sale by a Hindu widow of property inherited by her from her husband is sought to be set aside by the reversioner, and part of the price is proved to have been applied to purposes of necessity, then if the suit is brought during the widow's lifetime, the decree should be one declaring the right of the reversioner to the property on the death of the widow, and declaring also that the purchaser is entitled to a charge on the property only for the amount proved to have been so applied (*u*). If the suit is brought after the widow's death, the decree should be one setting aside the sale and directing the purchaser to deliver possession to the reversioner and to pay to him the balance of mesne profits from the date of the widow's death after deducting therefrom the amount proved to have been applied to purposes of necessity with interest thereon (*v*). But if the amount proved to have been applied to purposes of necessity exceeds the amount of mesne profits, the decree should be one setting aside the sale and for possession conditionally upon the reversioner paying to the purchaser the difference between the two sums (*w*).

A widow is not always bound to sell exactly for the amount for which there is legal necessity, and the Courts have to see in each case whether, having regard to the circumstances, the alienation was a proper one. It would manifestly be impossible and possibly prejudicial to the interest of the estate if the widow were held to be bound in every instance to sell the property for payment of a debt due from her husband for exactly the sum due to the creditor (*x*). See notes to sec. 181D.

190. Election by reversioner.—(*1*) An alienation by a widow of her husband's estate without legal necessity or an invalid surrender is not altogether void, but only voidable by the next reversioner. He may affirm it, or he may treat it as a nullity [s. 185]. If he elects to affirm it, he and transferees from him will be precluded from exercising his right to avoid it and from questioning the transaction (*y*). The election may be made after the reversion has fallen into possession, or even before (*z*).

(*2*) The above rule applies not only to male but also to female reversioners (*a*).

191. Alienation made by widow with consent of reversioner whether binding on him and actual reversioner.—(*1*) A reversioner, whether a male or female (*b*), who consents

(*u*) *Mahomed Shamsool* v. *Shewukram* (1874) 14 Beng. L.R. 226, 2 I.A. 7.

(*v*) *Deputy Commissioner of Kheri* v. *Khanjan Singh* (1907) 29 All. 331, 34 I.A. 72. See also *Collector of Masulipatam* v. *Cavaly Vencata* (1861) 8 M.I.A. 529, 555-556; *Doorga Parsad* v. *Doorga Konwari* (1878) 4 Cal. 190, 204, 5 I.A. 149.

(*w*) *Bhagwat Dayal* v. *Debi Dayal* (1908) 35 Cal. 420, 429-430, 35 I.A. 48.

(*x*) *Naman Lal* v. *Har Bhagwan* (1921) 2 Lah. 357, 66 I.C. 362, ('22) A.L. 317; *Bal Krishna* v. *Hira Lal* (1919) 41 All. 338, 50 I.C. 74, ('19) A.A. 406; *Felaram* v. *Bagalanand* (1910) 14 C.W.N. 895, 6 I.C. 207.

(*y*) *Ramgouda* v. *Bhausaheb* (1927) 54 I.A. 396, 402, 52 Bom. 1, 7, 105 I.C. 708, ('27) A.PC. 227; *Ram Bharose* v. *Bhagwan Devi* (1944) 19 Luck. 37.

(*z*) *Rangaswami* v. *Nachiappa* (1919) 46 I.A. 72, 42 Mad. 523, 50 I.C. 488, ('18) A.PC. 196; *Akkawa* v. *Sayad Khan* (1927) 51 Bom. 475, 485-486, 102 I.C. 232, ('27) A.B. 260; *Patan Dei* v. *Santoo Prasad* (1944) Luck. 557.

(*a*) (1927) 51 Bom. 475, 485-486, 102 I.C. 232, ('27) A.B. 260, *supra*; *Patan Dei* v. *Santoo Prasad* (1944) Luck. 557.

(*b*) (1927) 51 Bom. 475, 102 I.C. 232, ('27) A.B. 260, *supra*; *Patan Dei* v. *Santoo Prasad* (1944) Luck. 557.

to an alienation by a widow or other limited heir made without legal necessity, or to an invalid surrender, and transferees from him, are precluded from disputing the validity of the alienation (*c*) [ills. (a) and (b)], though he may have received no consideration for his consent (*d*). It is immaterial that the alienation is by way of gift [see ills. (a) and (b)]. **S. 191**

But if the actual reversioner at the widow's death be a different person, he is not precluded from questioning the alienation, though even as regards him the alienation will stand good unless he proves that the transaction was one without legal necessity [s. 183 (*1*)]. The actual reversioner, even if he be the son of the consenting reversioner, is not bound by his father's consent (*e*), unless the consent was given for a consideration and the son enjoyed the benefit of it (*f*) [ill. (c)]. See sec. 192.

(*2*) A reversioner who takes from an alienee from a widow a mortgage of the alienated property is not on that ground precluded from questioning the alienation on the widow's death (*g*) [ill. (d)].

Illustrations.

(a) A Hindu widow executes a deed of gift of a portion of her husband's property to *D*. *F* who is then the nearest reversioner joins in the deed. After the widow's death *F*, alleging that the gift is invalid [s. 183 (4)] sues *D* for possession of the property. *F* having consented to the gift is estopped from disputing the validity of the gift: *Basappa* v. *Fakirappa* (1922) 46 Bom. 292, 64 I.C. 214, ('22) A.B. 102; *Akkawa* v. *Sayad Khan* (1927) 51 Bom. 475, 102 I.C. 232, ('27) A.B. 260.

(b) *A* dies leaving a mother *M* and two male relations *F* and *G* who are then the nearest reversioners. On *A*'s death *M* succeeds to the estate of her son. *M* executes a deed of gift of a portion of her son's property in favour of a family idol. *F* joins in the deed of gift. *G* sues *M* and the donee for a declaration that the alienation is invalid,

(*c*) *Basappa* v. *Fakirappa* (1922) 46 Bom. 292, 64 I.C. 214, ('22) A.B. 102, explaining *Bai Parvati* v. *Dayabhai* (1920) 44 Bom. 488, 58 I.C. 266, ('20) A.B. 355; *Bhausaheb* v. *Ramgauda* (1923) 25 Bom. L.R. 813, 76 I.C. 937, ('23) A.B. 471; *Fateh Singh* v. *Thakur Rukmini* (1923) 45 All. 339, 72 I.C. 8, ('23) A.A. 387 [F.B.]; *Akkawa* v. *Sayad Khan*, *supra*; *Babu Singh* v. *Rameshwar Baksh* (1932) 7 Luck. 360, 135 I.C. 881, ('32) A.O. 90; *Jiwan Singh* v. *Mistri Lal* (1896) 18 All. 146, 23 I.A. 1 [transfer confined to widow's estate]; *Rup Narain* v. *Gopal Devi* (1909) 36 Cal. 780, 36 I.A. 103, 3 I.C. 382 [transfer confined to widow's estate]; *Baburao* v. *Tukaram* (1931) 33 Bom. L.R. 235, 131 I.C. 660, ('31) A.B. 208; *Ram Bharose* v. *Bhagwan Devi* (1944) 19 Luck. 37.

(*d*) *Ramakottaya* v. *Viraraghavayya* (1929) 52 Mad. 556, 119 I.C. 156, ('29) A.M. 502.

(*e*) *Rangaswami* v. *Nachiappa* (1919) 42 Mad. 523, 535, 536, 46 I.A. 72, 83, 84, 50 I.C. 498, ('18) A.PC. 196. See also *Ramgouda* v. *Bhausaheb* (1927) 54 I.A. 396, 402-403, 52 Bom. 1, 7, 107 I.C. 708, ('27) A.PC. 227, where part of the alienation was in favour of the father; *Thakur Prasad* v. *Musammat Dipa Kuer* (1931) 10 Pat. 352, 134 I.C. 129, ('31) A.P. 452. In *Baburao* v. *Tukaram* (1931) 33 Bom. L.R. 285, 131 I.C. 660, ('31) A.B. 208, the plaintiffs who claimed to set aside a gift to which their *step-mother* had consented were not the reversionery heirs of the deceased owner; *Devendranath Sarma* v. *Nagendranath Dutt* (1933) 60 Cal. 1158, 149 I.C. 522, ('33) A.C. 900.

(*f*) *Vinayak* v. *Govind* (1901) 25 Bom. 129, 136, 141. See also *Bahadur Singh* v. *Ram Bahadur* (1923) 45 All. 277, 71 I.C. 405, ('23) A.A. 204.

(*g*) 42 Mad. 523, 537-539, 46 I.A. 72, 85-87, 50 I.C. 498, ('18) A.PC. 196, *supra*.

S. 191 and a decree is passed declaring that the gift is void beyond *M*'s lifetime. After *M*'s death *F* sues the donee for possession of his one-half share in the property comprised in the gift. *F* is bound by his consent, and he is precluded from challenging the validity of the gift, though the gift was declared invalid in *G*'s suit and though *G* would be entitled to recover his one-half share from the donee: *Fateh Singh* v. *Thakur Rukmini* (1923) 45 All. 339, 72 I.C. 8, ('23) A.A. 387 [F.B.].

(c) A Hindu dies leaving a widow *R*, a sister *B*, and *B*'s son *V*. *R* sells a portion of her husband's property with *V*'s consent. The sale is effected to obtain necessary funds for *V*'s marriage. *V* then marries, and a son *G* is born to him. After the sale *B* dies, then *V*, and then *R*, the widow. After *R*'s death, *G*, who is then the actual reversioner, sues the purchaser for possession of the property sold to him. It is proved that there was no legal necessity for the sale. It is not proved that *B* consented to the sale. Upon these facts the High Court of Bombay held that *G* was bound by the consent of his father *V*. Ranade, J., said: "In the course of the arguments I suggested to the respondent's [plaintiff's] pleader what would have been the result if Radhabai had, instead of spending the money on Venkatesh's marriage, used it for building a house for Venkatesh, and plaintiff *enjoyed the use of the house* after Venkatesh. In such a case as this, would it have been open to plaintiff to question the sale by Radhabai and retain the house she built for Venkatesh out of the proceeds? There can be only one answer to such a question." Sir Lawrence Jenkins said: "The occasion for the sale no doubt was to supply the funds required for Venkatesh's marriage, but then it was this very marriage to which the plaintiff owed his being, and without which he would not have been in existence to make this claim": *Vinayak* v. *Govind* (1901) 25 Bom. 129, 136, 141. See in this connection *Bahadur Singh* v. *Ram Bahadur* (1923) 45 All. 277, 71 I.C. 405, ('23) A.A. 204.

(d) *A* dies leaving a mother *M*, a paternal cousin *R*, and a remoter paternal cousin *P*. On *A*'s death *M* succeeds to his estate as his heir. *M* executes a deed of gift of a *portion* of her son's property to *R* who is then the nearest reversioner. [The gift is therefore bad in law s. 183 (4)]. Afterwards *R* dies and his estate vests in *X*. *X* mortgages to *P* the property given by *M* to *R*. Then *M* dies. After *M*'s death *P*, who is then the actual reversioner, claims the property given by *M* to *R* and mortgaged by *X* to *P*. *P* is entitled to recover the property. The fact that he took a mortgage of the property does not preclude him from claiming it as a reversioner. "At the time of the mortgage the plaintiff [*P*] did not know whether he would ever be such a reversioner in fact as would give him a practical interest to quarrel with the deed of gift": *Rangaswami* v. *Nachiappa* (1919) 46 I.A. 72, 87, 42 Mad. 523, 50 I.C. 498, ('18) A.PC. 196, with facts simplified.

In a recent Allahabad case it was held that if the nearest reversioner at the time of an alienation made by a Hindu widow of her husband's property assents to the alienation neither he *nor any one claiming through him* [in that case, the reversioner's son] can afterwards dispute its validity (*h*). This ruling, it is submitted, proceeds upon a misapprehension of a passage in the judgment of the Privy Council in *Bajrangi*'s case (*i*) which is as follows:—"The appellants [plaintiffs] who *claim through* Matadin Singh and Baijnath Singh must be held bound by the consent of their fathers." *Bajrangi*'s case was considered by their Lordships in *Rangaswami*'s case (*j*). Referring to the above passage their Lordships said:—"It is true that the concluding words of the judgment as to the sons being bound by the consent of the fathers, 'through whom they claim' could be read, as indeed they have been read, as indicating that consent operated *proprio vigore*. But two remarks fall to be made. First, the idea of an eventual reversioner

(*h*) *Mahadeo Prasad* v. *Matra Prasad* (1922) 44 All. 44, 53, 63 I.C. 721, ('22) A.A. 297.

(*i*) (1907) 30 All. 1, 35 I.A. 1, 16.

(*j*) (1919) 42 Mad. 523, 535-536, 46 I.A. 72, 83-84, 50 I.C. 498, ('18) A.PC. 196.

claiming through any one who went before him is opposed both to principle and authority. It is opposed to principle because, as already stated, there is no vested right till the death. It is opposed to authority: *Bahadur Singh* v. *Mohar Singh* (*k*). . . . . The judgment was only meant to settle the point at issue—namely, the comparative merits of the Allahabad and Calcutta ruling." *Bajrangi's* case, therefore, is not an authority for the proposition that the consent of the next reversioner to an alienation binds his son or any other person claiming through him.

192. Compromise and family arrangement by widow—reversioner party to and benefiting by the transaction.— Where a widow or other limited heir enters into a family arrangement (*l*) [ills. (a) and (b)], or into a compromise which involves an alienation of the estate (*m*) [ill. (c)], the reversioner who has been a party to and has benefited by the transaction is precluded from questioning the alienation; and so are his descendants (*n*). There is no question in a case of this kind of a transfer of *spes successionis* by the reversioner. The reversioner, being a party to the transaction cannot repudiate it.

In the case of a family arrangement it is not necessary in order to bind the reversioner that there should have been any previous dispute as to the rights of the parties (*o*).

Illustrations.

(a) A Hindu governed by the Benares school of Hindu law dies leaving a widow and three daughters, *D*, *M* and *H*, and grandsons by *D* and *H*. The widow claims an absolute title to certain properties which the daughters allege belonged to their father. An arrangement is then come to between the widow and the daughters whereby certain properties are given to the grandsons and certain other properties are divided among the daughters as their *absolute* property. The daughters and grandsons enter into immediate possession of their lots, and they deal with their shares as absolute owners. *H* executes a mortgage of her share. *M* sells one of the properties which came to her share to *R*. After the death of the widow and of *H* and *M*, *D* brings a suit against *R* for recovery of possession of the property sold to him by *M*, alleging that the property belonged to her father, and that on the death of her mother and sisters she became the sole heir of her father and was entitled to possession. Upon these facts it was held by their Lordships of the Privy Council that *D* who was a party to the arrangement could not be allowed to repudiate it and impeach a sale made on the faith of it. Their Lordships said: "Further, from the time of the arrangement of 1875 until the commencement of this suit, that is to say, for a period of 38 years, all the parties to the arrangement, including the plaintiff, *dealt as absolute owners with the property allotted to them*; and to this, with trifling exceptions, no objection was taken by the other parties to the division.

(*k*) (1901) 29 I.A. 1, 24 All. 94.

(*l*) *Musammat Hardei* v. *Bhagwan Singh* (1919) 24 C.W.N. 105, 50 I.C. 812, ('19) A.PC. 27; *Pulliah Chetti* v. *Varadarajulu* (1908) 31 Mad. 474; *Barati Lal* v. *Salik Ram* (1916) 38 All. 107, 31 I.C. 919, ('15) A.A. 441; *Chahlu* v. *Parmal* (1919) 41 All. 611, 51 I.C. 919, ('19) A.A. 371; *Ramgouda* v. *Bhausaheb* (1927) 54 I.A. 396, 52 Bom. 1, 105 I.C. 708, ('27) A.PC. 227.

(*m*) *Kanhai Lal* v. *Brij Lal* (1918) 45 I.A. 118, 40 All. 487, 47 I.C. 207, ('18) A.PC. 70.

(*n*) *Ramgouda* v. *Bhausaheb* (1927) 54 I.A. 396, 52 Bom. 1, 105 I.C. 708, ('27) A.PC. 227; *Bindeshri Tewari* v. *Lakhan Tewari* (1941) All. 763, 198 I.C. 18, ('42) A.A. 12, (1941) A.L.J. 581.

(*o*) *Pokhar Singh* v. *Dulari* (1930) 52 All. 716, 125 I.C. 1, ('30) A.A. 687.

S. 192 In these circumstances the true inference appears to their Lordships to be that, at a time when Pato [that is, the widow] was claiming to be absolutely entitled to the property in her possession, and when her rights and those of her daughters were in doubt, the members of the family agreed and arranged among themselves that the whole property should be at once divided among the daughters and their sons then living, the mother surrendering her claims and each daughter accepting the property allotted to her in severalty in lieu of the undivided share in the whole estate which would have devolved upon her on her mother's death and abandoning her right of survivorship on the death of either of her sisters. *Whether this arrangement is binding on the grandsons cannot be determined in this suit,* and on that question their Lordships express no opinion. But the plaintiff *at all events is bound by her own agreement*; and in view of this fact, and of the favour shown by the Courts to family arrangements and the long period of time which has elapsed since the arrangement was made, she cannot now be allowed to repudiate the agreement and to impeach a sale which was made upon the faith of it": *Mussammat Hardei* v. *Bhagwan Singh* (1919) 24 C.W.N. 105, 109, 50 I.C. 812, ('19) A.PC. 27.

(b) A Hindu died in 1846, leaving a widow, who survived until 1912, and a daughter. On the death of the widow *A* had succeeded to the estate. In 1868 the widow had alienated nearly the whole property by three deeds executed and registered on the same day. By the first deed she gave a property to her brother, by another she sold half of another property to *A*, and by the third she sold the other half of that property to her son-in-law. The signature on each of the deeds was attested by the two other alienees *A*, who survived the widow for six years, did not seek to set aside any of the alienations. After his death his son and grandsons brought a suit to recover the whole property. It was held that the three deeds were to be regarded as forming one transaction entered into by all the persons interested in the properties, and that *A*, and consequently the plaintiffs, were precluded from disputing the two alienations now sought to be set aside, the alienations being by the widow were avoidable, not void, and *A* being precluded from questioning them, it was not necessary to consider whether he could deal validly; with his reversionary interest. In the judgment their Lordships said: "Their Lordships consider that the decision of this case depends upon how far the three documents can be taken as separate and independent, or so connected as to form one transaction . . . Their Lordships conclude that all the circumstances strongly point to the three documents being part and parcel of one transaction by which a disposition was made of [the husband's] estate such as was likely to prevent disputes in the future and therefore in the best interests of all the parties. The three deeds appear thus to be inseparably connected together and in that view *A* not only consented to the sale to [the son-in-law and the gift to [her brother] but these dispositions formed parts of the same transaction by which he himself acquired a part of the estate. It was argued that *A*'s contingent interest as a remote reversioner could not be validly sold by him, as it was a mere *spes successionis*, and an agreement to sell such interest would also be void in law. It is not necessary to consider that question, because he did not in fact either sell or agree to sell his reversionary interest. It is settled law that an alienation by a widow in excess of her powers is not altogether void but only voidable by the reversioners, who may either singly or as a body be precluded from exercising their right to avoid it either by express ratification or by acts which treat it as valid or binding. If some person other than *A* had been at the death of [the widow] the nearest heir of her husband, it might have been open to him to question all or any of the three deeds, but *A* himself being a party to *and benefiting by the transaction* evidenced thereby was precluded from questioning any part of it. Nor is it other than a most notable circumstance that he did not, after [the widow's] death, easy to do so": *Ramgouda* v. *Bhausaheb* (1927) 54 I.A. 396, 401-402, 52 Bom 1, 105 I.C. 708, ('27) A.PC. 227.

(c) *A* and *B* are two Hindu brothers governed by the Benares school of Hindu law. *A* dies leaving a widow *P*. On *A*'s death *B* enters into possession of the family property, claiming it by right of *survivorship*. *P* contends that her husband *A* was separate from *B*, and she adopts *K* to her husband. *K* is *P*'s husband's sister's son. *B* dies leaving a widow *R*, a daughter, and *K*. On *B*'s death, his estate devolves on his widow *R*. On the widow's death it would pass to the daughter as a limited heir, and on her death, *K*, if his adoption is valid, would succeed as a reversioner. The daughter is the next or presumptive reversioner, and *K* is a remote or contingent reversioner.

B's widow, *R*, institutes two suits, one for a declaration that her husband was the owner of the entire joint family property, and another for a declaration that *K*'s adoption is invalid. A compromise is then entered into by which the property is divided between *B*'s widow, *R*, her daughter and *A*'s widow, *P*, *and K's adoption is recognised. P transfers the property which she got under the compromise to K as her adopted son. K is a party to the compromise.*

Then the daughter dies, and then the widow, *R*. On the death of *R*, *K* claims *B*'s property as *B*'s reversionary heir. Upon these facts it was held by their Lordships of the Privy Council that *K* was precluded from claiming as a reversioner. Their Lordships said: "It was also contended on his behalf that Kanhai Lal in 1892, whatever his intention may have been, was not in law competent to convey or relinquish any future possible right as a reversioner, and as an authority in support of that contention the decision of the High Court at Bombay in *Sumsuddin Goolam Husein* v. *Abdul Husein Kalimuddin* (p) was relied upon. That decision is not in point. There is no question here of a conveyance of, or of an agreement to convey any future right or expectancy, or of an agreement to relinquish, any future right or expectancy. *The question here is, whether Kanhai Lal did not by his acts in* 1892 *debar himself from now claiming as a reversioner. . . Kanhai Lal was a party to that compromise.* He was one of those whose claims to the family property, or to shares in it, induced Ram Dei, against her own interests and those of her daughter and greatly to her own detriment, to alter her position by agreeing to the compromise, *and under that compromise he obtained a substantial benefit, which he has hitherto enjoyed.* In their Lordships' opinion he is bound by it, and cannot now claim as a reversioner": *Kanhai Lal* v. *Brij Lal* (1918) 45 I.A. 118, 123, 40 All. 487, 47 I.C. 207, ('18) A.PC. 70.

Reversioner's son, whether compromise binding on him.—It has been held by the High Court of Allahabad, that where a reversioner is a party to a compromise and obtains some property under the compromise, his son, if he enters into possession of the property after his father's death and enjoys possession thereof in succession to his father, is precluded from repudiating the compromise and from claiming as a reversioner (q). See also ill. (c) above.

193. Compromise and family arrangement by widow—reversioner not a party—binding on reversioner, though not a party, if transaction bona fide.—(*1*) A compromise in the nature of a family arrangement entered into by a widow or other limited heir binds the reversioners, though they may not be parties thereto, provided it amounts to a *bona fide* settlement of disputes

(p) (1907) 31 Bom. 165.

(q) *Bahadur Singh* v. *Ram Bahadur* (1923) 45 All. 277, 71 I.C. 405, ('23) A.A. 204.

S. 193 in respect of the estate (r) [ills. (a) and (b)]. Even if it is not in the nature of a family arrangement, a compromise entered into by her *bona fide* for the benefit of the estate, and not for her personal advantage, binds the reversioners quite as much as a decree against her after litigation, though they may not be parties to the transaction (*s*) [ill. (c)]. In either case the fact that the compromise involves an alienation of the estate does not affect its validity. An alienation which is the result of a compromise, or the mode by which a compromise is carried into effect, falls within the power of the holder of a Hindu woman's estate either as being an alienation which is to be deemed to be induced by necessity, or as being in a parallel position to an alienation induced by necessity (*t*).

(2) An alienation by way of compromise entered into between a limited owner and a person who had no *bona fide* claim at all to the estate when the compromise was entered into does not bind the reversioners (*u*). Where a presumptive reversioner sued to set aside a gift by a widow and a compromise was entered into by which a portion of the estate was transferred to him, it was held that the compromise was not binding on the actual reversioner (*v*). See sec. 182, ill. (2).

Illustrations.

(a) A has a son B who is joint with him. *A* adopts the Mahomedan faith, but the management of the joint property remains with him. *B* then dies leaving a daughter D. Then *A* dies leaving his grand-daughter, *D*, and a son *S* by a predeceased daughter *D*1. On *A*'s death *D* claims the whole of the joint family property on the ground that *A*'s

(r) *Khunni Lal* v. *Gobind Krishna* (1911) 33 All. 356, 38 I.A. 87, 10 I.C. 477; *Hiran Bibi* v. *Sohan Bibi* (1914) 18 C.W.N. 929, 24 I.C. 309, ('14) A.PC. 44; *Upendra Nath* v. *Bindesri Prosad* (1915) 20 C.W.N. 210, 32 I.C. 468, ('16) A.C. 843; *Bihari Lal* v. *Daud Husain* (1913) 35 All. 240, 18 I.C. 721. In the following cases it was held that the compromise did not bind the actual reversioners: *Himmat Bahadur* v. *Dhampat Rai* (1916) 38 All. 335, 35 I.C. 148, ('17) A.A. 481 [no *bona fide* dispute and no *bona fide* settlement]; *Kanhaiya Lal* v. *Kishori Lal* (1916) 38 All. 679, 35 I.C. 683, ('16) A.A. 38 [probably no longer law]—see (1922) 49 I.A. 342, 1 Pat. 741, 69 I.C. 71, ('22) A.PC. 356 *infra*; *Janak Kishori* v. *Babu Debi Prasad* (1917) 2 Pat. L.J. 370, 39 I.C. 750, ('17) A.P. 490 [compromise by a widow of her claim as a *legatee* under her husband's will]; *Anup Narayan* v. *Mahabir Prasad* (1918) 3 Pat. L. J. 83, 42 I. C. 95, ('17) A. P. 86 [compromise not for the benefit of the estate]; *Narayan Singh* v. *Rajkumar* (1922) 44 All. 428, 66 I. C. 82, ('22) A. A. 217 [compromise not for the benefit of the estate]; *Musammat Bhagwati* v. *Jugada* (1921) 6 Pat. L. J. 604, 621-622, 67 I.C. 597, ('22) A.P. 352 [no doubtful claim].

(s) *R[illegible] Prasad* v. *Shyam Kumari* (1922) [illegible] 1 Pat. 741, 69 I.C. 71, ('22) [illegible], approving *Mohendra Nath* v. *[illegible]nessa* (1915) 21 Cal. L. J. 157, 27 I.[illegible] ('15) A.C. 629; *Raoji Rupa* v. *Kun[illegible] Hiralal* (1930) 57 I.A. 177, 55 Bom. 455, 123 I.C. 709, ('30) A.PC. 163.

(t) *Ramsumran Prasad* v. *Shyam Kumari* (1922) 1 Pat. 741, 745-746, 49 I.A. 342, 69 I.C. 71, ('22) A.PC. 356; *Babulal* v. *Maniklal* (1941) Nag. 124, 192 I.C. 826, ('41) A.N. 79.

(u) *Obala Kondoma* v. *Kandasami* (1924) 51 I.A. 145, 47 Mad. 181, 79 I.C. 961, ('24) A.PC. 56; *Baijnath Rai* v. *Mangla Prasad* (1926) 5 Pat. 350, 90 I.C. 732, ('26) A.P. 1; *Muthukumalli Ramayya* v. *Uppalapati Lakshmayya* (1943) Mad. 1, 202 I.C. 1, 69 I.A. 110, ('42) A.PC. 59.

(v) *Mt. Rajpali Kunwar* v. *Sureju Rai* (1936) 58 All. 1041 (F.B.), 163 I.C. 756, ('36) A.A. 507; *Muthukumalli Ramayya* v. *Uppalapati Lakshmayya* (1943) Mad. 1, 202 I.C. 1, (1942) A.L.J. 392, 69 I.A. 110, ('42) A.PC. 59.

conversion operated as a forfeiture of his rights in the property and that the property became immediately on *A*'s conversion the property of *B*. *S* claims the property as *A*'s daughter's son. A compromise is then arrived at between the parties under which *D* obtains 8½ annas of the joint property and *S* gets 7½ annas. *S* then alienates his share to *X*. After *D*'s death, her son, *F*, claiming to be the reversionary heir to his grandfather, *B*, brings a suit against *X* to recover from him the property transferred to him by *S*. It is contended on behalf of *F* that *D*, as *B*'s daughter, took only a limited interest in the property, and that she had therefore no authority, in the absence of legal necessity, to alienate the 7½ anna share in favour of *S*. **S. 193**

A
B D
D S—X
F

On the above facts it was held by the Privy Council that the compromise was binding upon *F* and that he was not entitled to recover the property from *X*. Their Lordships said: "The true test to apply to a transaction which is challenged by the reversioners as an alienation not binding on them is, whether the alienee *derives title* from the holder of the limited interest or life tenant. In the present case *Khairati Lal* [*S*] acquired no right from the daughters [*D*] of Daulat [*B*], for the 'compromise', to use their Lordships' language in *Rani Mewa Kuar* v. *Rani Hulas Kuar* (*w*), is based on the assumption that there was an *antecedent title of some kind* in the parties and the agreement acknowledges and defines what that title is": *Khunni Lal* v. *Gobind Krishna* (1911) 33 All. 356, 38 I.A. 87, 102-103, 10 I.C. 471.

(b) A Hindu, *H*, dies leaving a widow, *W*, and a daughter, *D*. After the death of *H*, *W* adopted a son *P* to *H*. *P* dies leaving a widow, *B*, and a daughter, *S*. After *P*'s death *D*, claiming as the heir of her father, *H*, sues *B* for possession of certain property alleging that it formed part of the estate of *H* and that *B* was not entitled to retain it. *B* contends that the property in dispute belonged to *P* as the lawfully adopted son of *H*, and that on *P*'s death she, as *P*'s widow, became entitled to it. The suit is settled by a compromise by which the property is divided in certain shares between *D* and *B*. *B* then dies, and after her death her daughter *S* sues *D* to set aside the compromise entered into by her mother, *B*, alleging that it involved an alienation of part of the property of her father, *P*, and that *B*, as *P*'s widow, had no authority to alienate it without legal necessity, and for recovery of the property from *D*. Upon these facts it was held by the Judicial Committee that the compromise was binding on *S*, and that she was not entitled to recover from *D* the property transferred to her by *B*. Their Lordships said: "*The compromise in question is in no sense of the word an alienation* by a limited owner of family property, *but a family settlement* in which each party takes a share of the family property by virtue of the independent title which is, to that extent, and by way of compromise, admitted by the other parties": *Hiran Bibi* v. *Sohan Bibi* (1914) 18 C.W.N. 929, 932, 24 I.C. 309, ('14) A.PC. 44.

H=W
D P=B
S

(c) A Hindu died leaving a widow and a paternal uncle's son. Prior to his death the deceased had brought a suit for a sale of certain properties mortgaged to him. The suit was continued by the widow, and she obtained a decree for Rs.1,47,000. Six of the mortgaged properties were then put up for sale by auction, and the widow, having leave to bid, bought them for Rs. 65,075. The mortgagors filed a petition in objection to the sale. The widow entered into a compromise with the mortgagors, one of the terms of the compromise being that the sale should be set aside. It was contended in a suit brought by the paternal uncle's son against the widow, the mortgagors and certain

(*w*) (1875) 1 I.A. at p. 166.

Ss. 193, 194A

persons to whom the properties were sold under the compromise that as the widow had purchased at the auction, the transaction was an alienation of immoveable property and therefore could only be justified by strict proof of necessity. Upon the facts the Judicial Committee held that the compromise was *bona fide* and for the benefit of the estate, and that the widow had power to enter into the compromise. As to the contention that the transaction amounted to an alienation of the husband's estate, their Lordships were inclined to think that an alienation, which is the result of a compromise, or the mode by which a compromise is carried into effect, would, if the compromise is reasonable and for the benefit of the estate, fall within the power of the holder of a Hindu woman's estate, either as being an alienation which is to be deemed to be by necessity, or as being in a parallel position to an alienation induced by necessity: *Ramsumran Prasad* v. *Shyam Kumari* (1922) 49 I.A. 342, 1 Pat. 741, 69 I.C. 71, ('22) A.PC. 356.

This section relates to cases of compromise to which the reversioners are not parties. S. 192 deals with cases of compromise to which the reversioners are parties.

As to burden of proof in cases of compromise, see notes to s. 182, "Burden of proof; 'Consent decree' involving alienation to mortgagee" at p. 191.

194. Compromise by widow of claims made by next reversioner.—Where a widow in possession of her husband's estate has entered into a compromise of a *claim made by the next reversioner* in respect of the estate, and the compromise is in the circumstances a family settlement which is prudent and reasonable, it is binding upon the estate [that is, the whole body of reversioners] (*x*). A mere device, however, between the widow and the next reversioner to divide the estate between them cannot be supported on the ground of a family arrangement. Thus a surrender by a widow of the whole of her husband's estate to the next reversioner, coupled with a re-transfer of the estate by him to the widow whereby she is constituted the *absolute* owner thereof, and a transfer back by the widow to him of part of the estate, cannot be supported as a family arrangement, and it is not binding on the actual reversioner at the widow's death, not even if he is the son of the consenting reversioner. If the w[illegible]ormed part[illegible]rporting to be the absolute owner of the properties th[illegible]e to her share, transfers them to a third person the ac[illegible] reversioner is entitled to have the transfer set aside (*y*).

194A. Widow's power of alienation for payment of trade debts.—A widow or other limited heir may alienate or charge the estate for payment of debts properly incurred by her in connection with the business inherited by her from the deceased owner (*z*). If the business involves the purchase

(*x*) *Mata Prasad* v. *Nageshar Sahai* (1925) 52 I.A. 398, 47 All. 883, 91 I.C. 37, ('25) A.PC. 272 [compromise of suit].

(*y*) *Thakur Prasad* v. *Musammat Dipa Kuer* (1931) 10 Pat. 352, 134 I.C. 129, ('31) A.P. 442.

(*z*) *Sham Sunder* v. *Acchhan Kunwar* (1898) 21 All. 71, 25 I.A. 183. See also *Amarnath* v. *Achhan Kuar* (1892) 14 All. 420, 19 I.A. 196.

and re-sale of immoveable property, she may in the course of business sell properties so purchased by her. No question of legal necessity arises in such a case (*a*). **Ss. 194A, 195**

As to unsecured trade debts, see s. 195.

195. Unsecured debts incurred by widow for legal necessity.—Debts contracted by a widow or other female heir may be ordinary debts incurred for purposes amounting to a legal necessity, *e.g.*, marriage of her daughter, or they may be trade debts.

As regards ordinary debts incurred for a legal necessity, there is a conflict of opinion whether if the debt is not secure by a mortgage or a charge on the estate, the estate is liable in the hands of the reversioners after the widow's death. It has been held by the High Courts of Madras (*b*), and Allahabad (*c*), that the estate is not liable in such a case, the reason given being that a creditor who has accepted the *personal* liability of a widow is not entitled to proceed against the estate. On the other hand, it has been held by the High Court of Calcutta (*d*), that the debt being incurred for a legal necessity the estate is liable even if no mortgage or charge is created on the estate. In a later Calcutta case (*e*) where necessary repairs were executed to a house inherited by a daughter from her father, it was held that the estate of the father was liable though no charge had been created, the ground of the decision being that the estate had *benefited* by the repairs. A Full Bench of the Bombay High Court has recently followed the Calcutta High Court dissenting from other High Courts and overruling its own earlier decisions (*f*).

This is also the view taken in Nagpur (*g*). But if the creditor wishes to proceed against the estate he must frame his suit in a proper manner (*h*); for if the suit is filed against the widow personally and not as representing the estate, only the widow's interest can be proceeded against in execution (*i*).

(*a*) *Pahalwan Singh* v. *Jiwan Das* (1920) 42 All. 109, 59 I.C. 162, ('20) A.A. 345.

(*b*) *Ramasami* v. *Selattammal* (1882) 4 Mad. 375. See also *Regella* v. *Nimushakari* (1910) 33 Mad. 492, 5 I.C. 271.

(*c*) *Dhiraj Singh* v. *Manga Ram* (1897) 19 All. 300 [money borrowed by widow for marriage expenses of grand-daughter—no writing].

(*d*) *Ramcoomar* v. *Ichamoyi* (1881) 6 Cal. 36 [money borrowed by widow for marriage expenses of grand-daughter—no writing].

(*e*) *Harry* v. *Ganesh* (1884) 10 Cal. 823.

(*f*) *Dhondo Yeshwant* v. *Mishrilal Surajmull* (1936) 60 Bom. 311, 38 Bom. L. R. 6, 160 I.C. 1046, ('36) A. B. 59 [F.B.].

(*g*) *Raghoappa* v. *Balappa* (1939) Nag. 347.

(*h*) *Ananda Rao* v. *Mt. Annaparnabai* (1937) Nag. 1, ('37) A. N. 299.

(*i*) *Vasantarao* v. *Beharilal* (1938) Nag. 382, ('38) A. N. 225; *Sheikh Ghasit Mian* v. *Thakur Panchanan Singh* (1936) 15 Pat. 798, 166 I.C. 594, ('37) A. P. 58.

Ss. 195-197

As regards trade debts it has been held that such debts properly incurred by a widow on the credit of the assets of the business inherited by her from her husband are recoverable after her death *out of the assets of the business* as against the reversioners who have succeeded thereto even in the absence of a specific charge on the estate (*j*).

A widow who borrows on a simple bond may bind the estate by *subsequently* creating a mortgage on the estate for payment of the debt comprised in the bond (*k*). As to alienations for trade debts, see. s. 194A.

196. Acknowledgment of debt by widow.—Before the Indian Limitation (Amendment) Act, 1927, it was held by the Judicial Committee that an acknowledgment of debt by a widow or other limited heir does not bind the reversioners (*l*). It is now provided by sec. 3 of that Act that an acknowledgment signed, or a payment made, in respect of any liability, by a widow or other limited heir, shall be a valid acknowledgment or payment, as the case may be, as against a reversioner succeeding to such liability.

For acknowledgment, see s. 19 of the Indian Limitation Act; for payment of interest and part payment of principal, see s. 20 of that Act. The Amendment Act of 1927 amends s. 21 of the original Act.

197. Surrender of estate by widow.—(*1*) *Surrender must be of whole estate.*—An alienation by a widow or other limited heir of the estate inherited by her may be validated if it can be shown to be a surrender of her *whole interest in the whole estate* (*m*) in favour of *the nearest reversioner, if there be only one, or of the whole body of reversioners, if* there be *more than one* (*n*) at the time of the alienation. In such circumstances the question of necessity does not fall to be considered [paras (a) to (d) and (f)]. But the surrender must be a *bona fide* surrender, and not a device to divide the estate with the reversioner (*o*). A sale

(*j*) *Sakrabhai* v. *Maganlal* (1902) 26 Bom. 206; *Pahalwan Singh* v. *Jivan Das* (1918) 42 All. 109, 59 I.C. 162, ('20) A. A. 345.

(*k*) *Bhup Singh* v. *Jhamman Singh* (1922) 44 All. 95, 65 I.C. 724, ('22) A.A. 169.

(*l*) *Soni Ram* v. *Kanhaiya Lal* (1913) 40 I.A. 74, 35 All. 227, 19 I.C. 291, affmg. 32 All. 33, 3 I.C. 725.

(*m*) *Muthukumalli Ramayya* v. *Uppalapati Lakshmayya* (1943) Mad. 1, 202 I.C. 1, 69 I.A. 110, ('42) A.PC. 59, 15 I.R. 26.

(*n*) *Manjaya* v. *Sheshgiri* (1925) 49 Bom. 187, 85 I.C. 20, ('25) A.B. 129.

(*o*) *Rangaswami* v. *Nachiappa* (1919) 46 I.A. 72, 84, 42 Mad. 523, 537, 50 I.C. 498, ('18) A. PC. 196; *Bhagwat Koer* v. *Dhanukdhari Prasad Singh* (1919) 46 I.A. 259, 271, 47 Cal. 466, 483, 53 I.C. 347, ('19) A.PC. 75; *Surreshwar* v. *Maheshrani* (1920) 47 I.A. 233, 48 Cal. 100, 57 I.C. 325, ('21) A.PC. 107; *Behari Lal* v. *Madho Lal* (1892) 19 Cal. 236, 19 I.A. 30; *Rangappa* v. *Kamti* (1908) 31 Mad. 366; *Pilu* v. *Babaji* (1910) 34 Bom. 165, 4 I.C. 584; *Moti* v. *Laldas* (1917) 41 Bom. 93, 37 I.C. 945, ('16) A.B 85; *Khawani Singh* v. *Chet Ram* (1917) 39 All. 1, 37 I.C. 86, ('17) A.A. 341; *Sham Rathi* v. *Jaichha* (1917) 39 All. 520, 40 I.C. 117, ('17) A.A. 300; *Diltor Koer* v. *Harku Singh* (1917) 2 Pat. L. J. 578, 41 I.C. 631, ('17) A.P. 538; *Chunder* v. *Sarnamayi* (1894) 22 Cal. 354; *Thakur Prasad* v. *Musammat Dipa Kuer* (1931) 10 Pat. 352, 134 I.C. 129, ('31) A.P. 442.

of the estate for consideration cannot be regarded as a surrender (p). [ills. (e), (h) and (i)]. If there are two or more widows, the surrender must be by all of them (q). **S. 197**

Surrender.—But the omission, due to ignorance or to oversight, of a small portion of the whole property, does not affect the validity of the surrender when it is otherwise *bona fide* (r).

A surrender is not invalid merely because a small item of property, from the possession of which the husband was kept out for a long time and the widow, therefore, was under the impression, that it did not belong to the estate, was not included in the deed (s).

Where the husband exchanged one land for another and the deed of surrender by the widow mentioned the survey number of the former but the latter was actually delivered, the surrender was held to be valid (t).

It is settled by long practice and confirmed by decisions that a Hindu widow can renounce in favour of the nearest reversioner if there be only one, or of all the reversioners nearest in degree if they are more than one at the moment. That is to say, she can, so to speak, by voluntary act operate her own death. The principle on which the whole transaction rests is the effacement of the widow—an effacement which in other circumstances is effected by actual death or by civil death—which opens the estate of the deceased husband to his next heirs at that date. Now, there cannot be a widow who is partly effaced and partly not so, and consequently there can be no surrender or renunciation of *part* of the estate (u). The surrender may be effected by any process having that effect, provided that there is a *bona fide* and total renunciation of the widow's right to hold the property. Thus a compromise between a widow and the next reversioner may operate as a surrender (v) [see ill. (d)]. Again the surrender need not be effected by a single transfer of all the properties at the same time. It may consist of successive transfers provided the result at the end is a complete effacement of the widow (w).

A deed of surrender is really a deed of gift and not a deed of release for purposes of stamp (x).

Surrender by widow coupled with a provision for her maintenance.—A surrender, as stated above, must be a *bona fide* surrender, not a device to divide the estate with the reversioner. To make an arrangement for such a device, it is not necessary that the lady surrendering should part with the property *directly*. An arrangement, by which the reversioner as a consideration for the surrender promised to convey a portion of the property to a *nominee or nominees* of the lady surrendering, might well fall under the description of a device to divide the estate. But where disputes arise between a widow and the next reversio[illegible] title to her husband's property, and a *compromise* is entered into whereby [illegible] relinquishes her right of succession to the property in consideration of a sm[illegible]tion of the property being set apart *for her maintenance* for her life, the compromise is a *bona fide* surrender of the whole estate, and not a device to

(p) *Shanti Kumar Pal* v. *Mukundlal Mandal* (1935) 62 Cal. 204, 156 I C. 209, ('35) A.C. 20.

(q) *Dulhin Parbati Kuer* v. *Baijnath Prasad* (1935) 14 Pat. 518.

(r) *Hari Bai Annaji* v. *Narayan Hari* (1938) Bom. 723.

(s) *Brajeshwaree Dasee* v. *Manoranjan Datta* (1937) 1 Cal. 619, 171 I.C. 626, ('37) A.C. 107.

(t) *Ramayya* v. *Bapanamma* (1937) Mad. 248, 166 I.C. 153, ('37) A.M. 146.

(u) *Rangaswami* v. *Nachiappa* (1919) 46 I A. 72, 79-80, 42 Mad. 523, 532, 50 I C. 498, ('18) A.PC. 196.

(v) *Bhagwat Koer* v. *Dhanukdhari* (1919) 46 I.A. 259, 271, 47 Cal. 466, 483, 53 I.C. 347, ('19) A.PC. 75; *Surreshwar* v. *Maheshrani* (1920) 47 I.A. 233, 48 Cal. 100, 57 I.C. 325, ('21) A.PC. 107; *Chinnaswami* v. *Appaswami* (1919) 42 Mad. 25, 48 I.C. 147, ('19) A.M. 865; *Angamuthu* v. *Varatharajulu* (1918) 42 Mad. 854, 53 I.C. 386, ('20) A.M. 627; *Rama Nana* v. *Dhondi* (1923) 47 Bom. 678, 76 I.C. 607, ('23) A.B. 432; *Ram Adhar* v. *Ram Manohar* (1923) 45 All. 610, 73 I.C. 990, ('24) A.A. 114

(w) *Maru* v. *Hanso* (1926) 48 All. 485, 95 I.C. 543, ('26) A.A. 413.

(x) *In re Khetro Moni Debya* (1937) 17 Pat. 95 (F.B.), 172 I.C. 847, ('38) A.P. 33.

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divide it with the next reversioner (*y*) [ills. (d) and (e)]. This decision was treated as an authority in a Bombay case for the proposition that a surrender may be *total* in spite of a provision for the maintenance of the widow surrendering the estate (*z*). Where the estate consisted of 231 acres on land and the widow reserved 42 acres thereout for her maintenance and purported to surrender the rest to her daughter, the next reversioner, it was held that the transaction did not amount to a valid surrender (*a*). Where the widow purporting to surrender her estate reserved a life interest for herself, the Privy Council held that there was no valid surrender (*b*). In *Man Singh* v. *Nowlakhbate* (*c*), the estate was under the Court of Wards and the two widows were getting maintenance of Rs. 625 each per mensem. The widows then purported to surrender the estate to the next reversioner stipulating for an increased maintenance of Rs. 2,000 per mensem. The Judicial Committee held that there was no *bona fide* surrender and that it was void in law [see ill. (f)]. Where an estate was small and the income was just sufficient for the maintenance of the widow and the deed of surrender stipulated that the entire income after the payment of land revenue should be paid to her, it was held that no valid surrender was possible and that it was therefore invalid (*c1*).

Motive.—The widow's motive in making a surrender is immaterial. Therefore a surrender by her cannot be called into question on the ground of improper motive (*d*).

(*2*) *Surrender in favour of female reversioners*:—A surrender of the estate may be made even in favour of a female reversioner (*e*). A surrender, however, to a female reversioner does not enlarge the estate of such reversioner, but merely accelerates it. It does not confer on the female reversioner any larger estate than the limited and qualified estate to which she would have succeeded had she survived the limited heir (*f*) [ill. (g)]. The estate vests in her as a limited owner and on her death it passes to the next reversioner. It cannot, however, revert to the widow, for the widow has by the surrender completely effaced herself (*g*).

(*2A*) A widow may surrender the estate in favour of the next male reversioner with the consent of an intermediate female reversioner but in such a case the intermediate reversioner cannot reserve for herself a substantial part of the property or stipulate for any benefit except what is necessary for her

(*y*) *Sureshwar* v. *Maheshrani* (1920) 47 I.A. 233, 48 Cal. 100, 57 I.C. 325, ('21) A.PC. 107; *Naru* v. *Tai* (1923) 47 Bom. 431, 76 I.C. 265, ('23) A.B. 191. See also *Hem Chunder* v. *Sarnamoyi* (1894) 22 Cal. 354 [not good law, correct view- alienation wholly void]; *Kanuram* v. *Kashi Chandra* (1909) 14 C. W. N. 226, 21 I.C. 660 [a decision of doubtful authority]; *Challa Subbiah* v. *Palni* (1908) 31 Mad. 446 [surrender of entire interest to reversioner—transfer back by reversioner of one-third to widow's brother pursuant to agreement at time of surrender—surrender held valid]; *Rangappa* v. *Kamti* (1908) 31 Mad. 366 [not good law —commented on adversely by P.C. in (1919) 46 I.A. 72, 84, 42 Mad. 523, 537, 50 I.C. 498, ('18) A.PC. 196]; *Sitanna* v. *Viranna* (1934) 57 Mad. 749, 148 I.C. 828, ('34) A.PC. 105, where the widow reserved only 6 acres of land for her maintenance.

(*z*) *Rama Nana* v. *Dhondi Murari* (1923) 47 Bom. 678, 76 I.C. 607, ('23) A.B. 432, dissenting from *Adireppa* v. *Tontappa* (1920) 44 Bom. 255, 55 I.C. 369, ('20) A.B. 345; *Krishna Mahatarba* v. *Baban* [illegible] B) Bom. 287.

(*a*) *Gan*[illegible]*abhudha* (1932) 56 Bom. 410, [illegible] ('32) A.B 625.

(*b*) *Behari La*[illegible]*dho Lall* (1891) 19 I.A. 30, 19 Cal. 230.

(*c*) (1926) 53 I.A. 11, 5 Pat. 290, 94 I.C. 830, ('26) A.PC. 2, in app. from (1923) 2 Pat. 607, 73 I.C. 822, ('23) A.P. 492.

(*c1*) *Ananta Nilkanth* v. *Lala Rupnarayan* (1945) Nag. 698.

(*d*) *Challa Subbiah* v. *Paluri* (1908) 31 Mad. 446; *Subbalakshmi* v. *Narayana Iyyar* (1935) 58 Mad. 150, 152 I.C. 391, ('34) A.M. 535.

(*e*) *Sitanna* v. *Viranna* (1934) 57 Mad. 749, 148 I.C. 828, ('34) A.PC. 105.

(*f*) *Bhupal Ram* v. *Lachma Kuar* (1889) 11 All. 253; *Bepin Behari* v. *Durga Charan* (1908) 35 Cal. 1086, 1090; *Rup Ram* v. *Rewati* (1910) 32 All. 582, 6 I.C. 541.

(*g*) *Sartaji* v. *Ramjas* (1924) 46 All. 50, 79 I.C. 25, ('24) A.A. 166. But see *Chengappa* v. *Buradagunta* (1920) 43 Mad. 855, 60 I.C. 135, ('21) A.M. 246.

maintenance. If she does so the surrender is invalid and does not bind the actual reversioner. In such a case a remote reversioner may file a suit for declaration to that effect (*h*). **S. 197**

(*3*) *Surrender in favour of female reversioners in Bombay.*—The provisions of sub-sec. (*2*) do not apply to such females in Bombay as take an absolute interest in property inherited by them from a male, *e.g.*, the daughter, daughter's daughter, and the like. A surrender to such a female passes the whole estate absolutely to her [see ill. (h)].

(*4*) *Gift of whole property to a third party with consent of next reversioner.*—There is a conflict of opinion whether a gift by a widow of her entire interest in the whole estate to a stranger with the consent of the next reversioner can be supported as a surrender so as to bind the actual reversioner at the widow's death [s. 183 (*4*)].

(*5*) *Where surrender follows prior alienations.*—Where a portion of the estate was validly alienated by the widow for legal necessity (such as discharge of husband's debts) and the remaining estate was then surrendered it was held that the surrender was valid (*i*). Where a widow alienates a portion of the estate inherited by her from her husband without legal necessity and subsequently surrenders the whole of her interest in the estate to the next reversioner, the surrender itself is valid and the reversioner is not entitled to immediate possession of the portion so alienated, but must wait for possession until her death. The reason is that though the alienation is not binding on the reversioner, it is binding on the widow for her life, and the alienee is entitled to possession during her lifetime (*j*).

In the Calcutta case Walmsley, J., held as above, while Page, J., held that the surrender extinguished the prior alienations so as to entitle the reversioner to recover immediate possession of the property alienated. As to the rights of an adopted son, see sec. 509.

(*6*) *Gift of whole estate followed by surrender of whole estate.*—It has been held by the High Court of Bombay that where a widow makes a gift of the whole estate to a third

(*h*) *Janaki Nath Ray* v. *Jyotish Chandra Achariya Choudri* (1941) Cal. 234, 193 I.C. 419, ('41) A.C. 41.

(*i*) *Ramayya* v. *Bapanamma* (1937) Mad. 248, 156 I.C. 153, ('37) A.M. 146.

(*j*) *Subbamma* v. *Subramanyam* (1916) 39 Mad. 1035, 32 I.C. 813, ('17) A.M. 473 [mortgage without legal necessity]: *Sundarasiva* v. *Viyyamma* (1925) 48 Mad. 933, 91 I.C. 401, ('25) A.M. 126; *Prafulla* v. *Bhabani* (1925) 52 Cal. 1018, 91 I.C. 897, ('26) A.C. 121, per Walmsley, J. [gift]; *Lachmi Chand* v. *Lachho* (1927) 49 All. 334, 100 I.C. 764, ('27) A.A 258 [mortgage without legal necessity].

S. 197 person, and afterwards surrenders the whole estate to the next reversioner, the surrender is in operative and invalid the reason given being that the widow by giving away the whole estate prior to the surrender put it out of her power to surrender her whole interest in the estate in favour of the reversioner (*k*).

(7) *Surrender followed by adoption.*—A valid surrender made by a Hindu widow of her husband's estate to the next reversioner cannot be defeated by a subsequent adoption of a son to her husband. The effect of a surrender is to vest an absolute estate in the reversioner, and the adopted son is not entitled to question it (*l*). It is otherwise if the surrender is invalid as being partial (*m*), or if it is invalid as in the case put in sub-sec. (*6*).

Illustrations.

(a) A Hindu dies leaving a widow and a daughter's son. The widow surrenders her estate in *four out of the five properties* inherited by her from her husband to the daughter's son. The surrender is not valid, for it is a surrender only of a *portion* of the estate : *Pilu* v. *Babaji* (1910) 34 Bom. 165, 4 I.C. 584.

(b) A Hindu dies leaving a widow, a daughter and a daughter's son. The widow executes a deed in favour of her daughter's son, whereby she *reserves a life-interest* for herself in her husband's property, and declares that *after her death* the property should go to the daughter's son. This is not a valid surrender, for it is not a surrender of the widow's *entire estate* in the property. A widow can accelerate the estate of the next reversioner only by conveying *absolutely* and by *destroying* her life-estate. It is essential that she should withdraw her own life-estate, so that the whole estate may get vested at once in the reversioner : *Behari Lal* v. *Madho Lal* (1891) 19 Cal. 236, 19 I.A. 30.

(c) *A* dies leaving a mother *M*. *M* succeeds to *A*'s properties for a woman's estate. She then transfers by way of gift a *portion* of the properties inherited by her to *R* who was then the nearest reversioner. The alienation is not valid, as it is not a surrender of *M*'s entire interest in the whole estate : *Rangaswami* v. *Nachiappa* (1919) 46 I.A. 72, 42 Mad. 523, 50 I.C. 498, ('18) A.PC. 196.

(d) A Hindu dies in 1872 leaving a widow and [illegible]. The nephew claimed the property as sole survivor of the joint family and [illegible] a certificate to collect debts due to the estate of *A*. The widow opposed the ap[illegible]n and alleged a partition. The Court found that the alleged partition had not taken place and granted the certificate to the nephew. This decision, being given only on a question of representation, did not preclude the widow from raising the question of title again in a suit properly instituted for that purpose ; but the widow accepted the decision and by an agreement made in 1874 she recognized the nephew's title, and was granted by him a maintenance allowance which she continued to receive until her death in 1904. The nephew died in 1894, and the estate passed under his will to *B*. In 1907 *D* claiming as the reversionary heir sued *B* to recover the estate. It was held by the Judicial Committee that the widow's agreement of 1874, in conjunction with her acceptance of maintenance till 1904,

(*k*) *Sakharam* v. *Thama* (1927) 51 Bom. 1019, 107 I.C. 265, ('27) A.B. 26.

(*l*) *Rama Nana* v. *Dhondi* (1923) 47 Bom. 678, 76 I.C. 607, ('23) A. B. 432 [surrender upheld] ; *Yeshwanta* v. *Antu* (1934) 58 Bom. 521, 154 I.C. 252, ('34) A. B. 351.

(*m*) *Pilu* v. *Babaji* (1910) 34 Bom. 165, 4 I.C. 584.

amounted to a complete relinquishment of the estate to the nephew, then the next reversioner, and that *D*'s claim accordingly failed. Their Lordships of the Privy Council said that there was in this case a complete self-effacement by the widow which precluded her from asserting any further claim to the estate: *Bhagwat Koer* v. *Dhanukdhari Prasad Singh* (1919) 46 I.A. 259, 47 Cal. 466, 53 I.C. 347, ('19) A.PC. 75. **S. 197**

(e) A Hindu dies leaving a widow and 4 daughters. By his will he bequeaths his immoveable property to the daughters. On his death the daughters take possession of the property under the will. The next reversioner sues the widow and daughters to set aside the will. The parties enter into a compromise by which the daughters give up their rights under the will, the widow surrenders all rights of succession to the immoveable property, and the plaintiff who by the surrender becomes entitled as next reversioner transfers half of the property to the daughters, and the plaintiff and the daughters each give a small portion of the land to the widow for her life. The compromise is a *bona fide* surrender of the whole estate, and not a device to divide it with the next reversioner. In the course of the judgment of the Judicial Committee said: "Is it then a device to divide the property between the lady and the reversioner? . . . . *It is here that the fact of the arrangement being a compromise becomes of importance.* Once the *bona fide* is admitted, we have the situation of a contest under which, if decision were one way, the estate was carried to the daughters away from the family, and a litigation in the course of which the estate would probably be much diminished. The situation made it a perfectly good consideration for the lady in order to avoid these results to consent to give up her own rights by surrender . . . The conveyance of small portions of land to the widowed mother was unobjectionable as it was only for maintenance": *Sureshwar* v. *Maheshrani* (1920) 47 I.A. 233, 238, 48 Cal. 100, 57 I.C. 325, ('21) A.PC. 107.

(f) The widows of the late male owner who were each getting rupees 625 a month as maintenance from the Court of Wards which was managing the property executed a deed by which they purported to surrender all their rights in the property inherited from their husband to the next reversioner, the latter agreeing to pay to the widow Rs. 2,000 per month for maintenance, the sum in case of default to be a charge upon the estate. The Privy Council, observing that there was no necessity for the surrender and that in 49 Cal. 100 the giving of a small portion of the estate to the widow for her maintenance was not objectionable, held the surrender to be void in law: *Man Singh* v. *Nowlakhbati* (1926) 53 I.A. 11, 5 Pat. 290, 94 I.C. 830, ('26) A.PC. 2.

(g) A Hindu governed by the Benares school of Hindu law dies leaving a widow, a daughter and a paternal uncle's son. The widow surrenders her interest in the property inherited by her to her daughter. The surrender is valid, but since a daughter, according to the Benares school, t[illegible]ted estate, the surrender will not enlarge her estate, in other words, she wil[illegible] the property *absolutely*. Th effect of the transaction is simply to accelerate the daughter's succession to the property and to entitle her to immediate possession. On the death of the daughter the property will pass to the uncle's son: *Bhupal Ram* v. *Lachma Kuar* (1888) 11 All. 253. It will not revert to the widow though she may then be alive.

(h) A Hindu governed by the Bombay school dies leaving a widow, a daughter and a nephew. In March 1911, the widow executes a deed of gift of the whole estate inherited by her from her husband in favour of her daughter. [A daughter in Bombay takes an absolute estate in the property inherited by her from her father; therefore, sub-sec. (2) does not apply.] In December 1912, the daughter transfers the whole estate back to the widow *absolutely*. The daughter dies in 1915 leaving a daughter. In April 1916, the widow makes a gift of the entire estate to her grand-daughter. On the death of the widow the nephew claims the estate as the reversionary heir. The gift to the grand-daughter is valid, and the nephew is not entitled to the property. The Court said:

Ss. 197, 198 "It cannot be suggested in the present case that in 1911, when the widow was in bad health, and her widowed daughter was staying with her, it was intended to be merely a device to divide the estate with the reversioner": *Naru* v. *Tai* (1923) 47 Bom. 431, 437, 76 I.C. 265, ('23) A.B. 191.

(i) A Hindu widow surrenders the whole of her estate to the next reversioner. At the same time the next reversioner transfers it back to the widow, and declares that she is the *absolute* owner thereof, and the widow in her turn transfers part of the estate to the next reversioner. It is found that there was no dispute of any kind between the parties, and the sole object was to convert the widow's estate into an absolute estate in consideration of a transfer of part of the estate to the next reversioner. The transactions are not binding on the son of the next reversioner, and he is entitled to avoid alienations of the estate purporting to have been made by her as the *absolute* owner thereof: *Thakur Prasad* v. *Musammat Dipa Kuer* (1931) 10 Pat. 352, 134 I.C. 129, ('31) A.P. 442.

198. Widow's power of management and investment.—(*1*) A widow or other limited heir is entitled to manage the estate inherited by her. Her power to manage the estate is similar to that of a manager of an infant estate as defined by the Privy Council in *Hunooman Persaud* v. *Mussamat Babooee* (*n*). "A widow like a manager of the family, must be allowed a reasonable latitude in the exercise of her powers, provided, ... she acts fairly to the expectant heirs" (*o*). The Court will not interfere with her management, unless there is danger to the estate from the manner in which she is dealing with it (*p*) [s. 204].

(*2*) If the husband has left debts, the widow is not bound to apply the income of the estate in discharge of the principal, but is bound to pay out of the surplus of her net income, only the interest (*q*). She is entitled to sell or mortgage the estate for the payment of the debts. The net income is her own exclusive property as widow, and she is not bound either to save or apply it for the benefit of the reversioners. At the same time she is not entitled to ignore the charges which are legally payable out of the gross income such as the *peishcush* and maintenance due to other members of the family and thereby add to the debts left by the husband so as to prejudice the reversioners (*r*).

(*3*) The widow is entitled to invest monies forming part of her husband's estate in such securities as she thinks proper so as to realize the highest interest. She is not bound to

(*n*) (1856) 6 M.I.A. 393: *Kameswar Pershad* v. *Run Bahadoor* (1880) 6 Cal. 843, 8 I.A. 8.

(*o*) *Venkaji* v. *Vishnu* (1894) 18 Bom. 534, 536.

(*p*) *Hurrydoss* v. *Sreemutty Uppoornah* (1856) 6 M.I.A. 433.

(*q*) *Jagannatham* v. *Vighneswaradu* (1932) 55 Mad. 216, 134 I.C. 881, ('32) A.M. 177.

(*r*) *Ramasami Chetti* v. *Mangaikarsu* (1895) 18 Mad. 113, 119-120; *Debi Dayal Sahoo* v. *Bhan Partap Singh* (1904) 31 Cal. 433, 443.

invest in Government securities. She may lend the monies on a mortgage. The Court must take care not to interfere with or restrict her in the full enjoyment of her rights as conferred upon her by the Hindu law in order to prevent a *possible* danger (*s*). **Ss. 198, 199**

If the property consists of a quarry, she may work the quarry, and apply the proceeds for her own purposes, provided she does not exhaust the land (*t*).

199. Decree against widow when binding on reversioners.— A widow or other limited heir represents the whole estate in legal proceedings relating thereto. Therefore, a decree passed against her and a sale of the estate in execution of such decree is binding not only on her, but on the reversioners, even though they were not parties to the suit, provided—

(1) the suit was in respect of a debt or other transaction binding on the estate (*u*), *and*

(2) the decree was passed against her as representing the estate, and not in her personal capacity (*v*),

"unless," as laid down by their Lordships of the Privy Council in the *Shivagunga* case (*w*), "it could be shown that there had not been a *fair* trial of the right in that suit." This does not mean that the suit should have been *contested to the end* as was erroneously held in the under-mentioned cases (*x*). The widow is entitled to compromise the suit, and a decree passed against her, though on a compromise or on an award, binds the reversioners as much as a decree in a suit contested to the end, provided the compromise was entered into by her *bona fide* for the benefit of the estate and not for her personal advantage. This rests on the fundamental principle that a compromise

(*s*) *Biswanath* v. *Khan*[illegible]) 6 Beng. L.R. 747-751.

(*t*) *Subba Reddi* v. *Chengalamma* (1899) 22 Mad. 126.

(*u*) *Jugal Kishore* v. *Jotendro Mohun* (1884) 10 Cal. 985, 11 I.A. 66; *Jhari* v. *Bijai* (1923) 45 All. 613, 74 I.C. 865, ('24) A. A. 109. See also *Derji* v. *Sambhu* (1900) 24 Bom. 135; *Veerabadra* v. *Marudaga* (1911) 34 Mad. 188, 8 I.C. 1072.

(*v*) *Katama Natchiar* v. *Raja of Shivagunga* (1863) 9 M.I.A. 539, 543, 608 [decree on ground *personal* to the widow]; *Nugender* v. *Kaminee* (1867) 11 M.I.A. 241; *Baijun* v. *Brij Bhookun* (1876) 1 Cal. 133, 2 I.A. 275; *Partab Narain* v. *Trilokoi* (1884) 11 I.A. 197, 207, 11 Cal. 186; *Hari Nath* v. *Mothurmohun* (1894) 21 Cal. 8, 20 I.A. 183 [decree against daughter—*res judicata*]; *Risal Singh* v. *Balwant Singh* (1918) 45 I.A. 168, 40 All. 593, 48 I.C. 553, ('18) A.PC. [*res judicata*]; *Ghelabhai* v. *Bai Javer* (1913) 37 Bom. 172, 17 I.C. 866; *Tirupatiraju* v. *Venkayya* (1922) 45 Mad. 504, 67 I.C. 479, ('22) A.M. 131 (F.B.) [not sued in representative character]; *Sulbi* v. *Ramkrishnabhatta* (1918) 42 Bom. 69, 43 I.C. 233, ('17) A.B. 11; *Bai Kanku* v. *Bai Jadav* (1919) 43 Bom. 869, 53 I.C. 164, ('19) A.B. 146 [decree against widow on ground *personal* to herself]; *Pramatha Nath* v. *Bhuban Mohan* (1922) 49 Cal. 45, 64 I.C. 980, ('22) A.C. 321 [*res judicata*]; *Lalit Mohan* v. *Dayamoyi* (1927) 45 Cal. L.J. 404, 105, I.C. 469, ('27) A.PC. 41 [personal decree against daughter].

(*w*) *Katama Natchiar* v. *Rajah of Shivagunga*, *supra*.

(*x*) *Mahadei* v. *Baldeo* (1908) 30 All. 75; *Sheo Narain* v. *Khurgo* (1882) 10 C.L.R. 337; *Rajlakshmi* v. *Katyayani* (1911) 38 Cal. 639, 672, 674, 12 I.C. 464; *Jeram* v. *Veerbai* (1903) 5 Bom. L. R. 885, 887; *Ram Sarup* v. *Ram Dei* (1907) 29 All. 239, 241.

S. 199 entered into by a Hindu widow *bona fide* for the benefit of the estate, and not for her own personal advantage, binds the reversioners as much as a decree against her after litigation (*y*). See s. 193.

The suit being against the widow in a *representative* character, that is, as representing her husband's estate, a decree passed against her operates as *res judicata* against the whole body of reversioners under the Code of Civil Procedure, s. 11, Expl. 6. A decree against the widow in respect of a transaction entered into by her husband binds her as well as the reversioners (*z*). A decree against the widow in respect of debts contracted for the purpose of carrying on a money-lending business inherited from her husband would not be a mere personal decree but would bind the reversionary estate (*a*). But a decree passed against a widow *personally* though it be in respect of debt incurred for legal necessity, does not bind the estate; a sale, therefore, in execution of such a decree can pass no more than the life-interest of the widow (*b*).

Before the Privy Council decision in *Ramsumran Prasad*'s case (*c*), there was a conflict of opinion whether a consent decree or a decree on an award bound the reversioner. This conflict is now set at rest by that decision, and such a decree may be as binding as a decree in a contentious suit.

With reference to the argument that a Hindu widow cannot compromise a suit in any case, Mookerjee, J., said in a Calcutta case (*d*): "The view cannot be defended on principle that a qualified owner like a Hindu widow, daughter, or mother is bound at her peril to pursue a litigation in respect of the estate in her hands, unremittingly to the ultimate Court of Appeal, and that she cannot *bona fide* effect a settlement of the matter in controversy, even though such compromise be in the best interest of the estate." The decision in that case was approved by their Lordships of the Privy Council in *Ramsumran Prasad*'s case (*e*), in which their Lordships said: "It may be observed at once that the argument which would refuse authority to compromise in any case would have very extreme consequences. A Hindu woman might be party to a litigation concerning considerable immoveable property, might be successful in the first Court and be threatened with an appeal, and have then a suggestion from the adversary that if she would part with a single item of property or few bighas he would let the judgment stand. She would have if the argument were sound to refuse the suggested compromise, and be prepared to fight the case up to the Privy Council. Or it might be put in another way. Her opponent could never suggest a compromise, because he would know that any compromise would be upset. It would be very undesirable in the interests of property owners that this extreme doctrine should be upheld, and th[illegible]ps, after consideration

(*y*) *Ramsumran Prasad* v. *Shyam Kumari* (1922) 49 I.A. 342, 1 Pat. 741, 69 I.C. 71, ('22) A.PC. 356, approving *Mohendra Nath* v. *Shamsunnessa* (1915) 19 C. W. N. 1280, 1285, 27 I.C. 954, ('15) A.C. 629; *Subbammal* v. *Avudaiyammal* (1907) 30 Mad. 3 [admission of debt by widow—decree on admission]; *Bhogaraju* v. *Addeppalli* (1912) 35 Mad. 560, 564-565, 12 I.C. 123; *Gur Nanak* v. *Jainarain* (1912) 34 All. 385, 14 I.C. 814 [appeal filed by widow withdrawn]; *Mata Prasad* v. *Nageshar Sahai* (1925) 52 I. A. 398, 47 All. 883, 91 I.C. 370, ('25) A.PC. 272 [compromise of suit between widow and next reversioner].

(*z*) *Madivalappa Irappa* v. *Subbappa Shankarappa* (1937) Bom. 906, 39 Bom. L. R. 895, 172 I.C. 184, ('37) A. B. 458.

(*a*) *Barada Prasad Saha* v. *Krishna Chandra Saha* (1934) 38 C.W.N. 33, 151 I.C. 268 ('34) A.C. 414.

(*b*) *Kallu* v. *Faiyaz* (1908) 30 All. 394; *Jugul Kishore* v. *Jotindro* (1884) 11 I.A. 66, 73, 10 Cal. 985; *Lalit Mohun* v. *Dayamoyi* (1927) 29 Bom. L.R. 759, 105 I.C. 469, ('27) A.PC. 41 [personal decree against daughter]; *Vasant Rao* v. *Beharilal* (1938) Nag. 382, ('38) A. N. 225; *Sheik Ghasit Mian* v. *Thakur Panchanan Singh* (1936) 15 Pat. 798, 166 I. C. 594, ('37) A.P. 58; *Anand Rao* v. *Annapurnabai* (1937) Nag. 1, ('37) A. N. 299; *Mallikarjungowda-Mudragowda* v. *Venkawa Ramachandrappa* (1940) Bom. 628, 191 I.C. 286, 42 Bom. L.R. 600.

(*c*) See footnote (*e*) *infra*.

(*d*) *Mohendra Nath* v. *Shamsunnessa* (1915) 21 Cal. L. J. 157, 163, 27 I.C. 954.

(*e*) *Ramsumran Prassad* v. *Shyam Kumari* (1922) 49 I.A. 342, 346, 1 Pat. 741, 746, 69 I.C. 71, ('22) A.PC. 356.

of the authorities that have been cited to them, are glad to find that they are not driven to any such extreme position." It follows from this that a decree on an award (*f*) and even a consent decree (*g*) would bind the reversioners if the compromise was for the benefit of the estate. An *ex parte* decree also may bind the reversioners (*h*). **Ss. 199, 200**

A consent decree in a suit against widow by her husband's brothers to recover property in her hands on the allegation that it is joint family property, in which she accepts that position and is satisfied with maintenance only, does not bind the reversioners. The reason is that the rule in this section applies only to a widow who *represents* her husband's estate. The moment she admits that the property is joint, she ceases to represent the estate (*i*). A widow sued to recover properties belonging to her husband and obtained a decree. In appeal the matter was settled and a consent decree was passed by which a portion of the properties was adjudged to the opposite party who executed the consent decree and obtained possession. The reversioners then obtained a declaration that the consent decree did not bind them. The widow then filed another suit to recover the properties allotted to the opposite party by the consent decree but failed. It was held by the Privy Council that the last decree did not affect the reversioners (*j*).

A decree against a widow for mesne profits on account of trespass committed by her in her personal capacity can only be executed against her personally and not against her husband's estate (*k*). But where cess was due in respect of the husband's estate and the estate in the hands of the widow was sold under the Public Demands Recovery Act, it was held that only the widow's interest passed to the purchaser (*l*). Where the widows sued to set aside a sale of the husband's property for arrears of revenue, obtained a decree in the trial court and got possession but the decree was set aside on appeal, and the widows became liable for mesne profits and costs and a portion of the estate in their possession was sold in execution of the decree, it was held that the entire estate passed under the sale (*m*).

Even in a case where the decree might have been executed against the whole interest in the estate including the reversion, if what was actually sold, was described as the interest of the judgment debtor, as a widow, only her interest passed (*n*).

Burden of proof.—In *Ramsumran Prasad*'s case (*o*) their Lordships kept it open whether in a case of compromise of a suit by a widow the burden lies absolutely and without qualification upon the reversioners impeaching the compromise to show that the compromise was not for the benefit of the estate.

As to debts binding on the estate, see sec. 195.

200. Decree in reversioner's suit against widow and *res judicata*.—When in a suit by the next reversioner against a widow relative to her deceased husband's estate an issue is finally determined, the issue is *res judicata* in any subsequent

(*f*) *Shib Deo* v. *Ram Prasad* (1924) 46 All. 637, 644-646, 87 I.C. 938, ('25) A.A. 79. See *Rama* v. *Daji* (1919) 43 Bom. 249, 48 I.C. 125, ('18) A.B. 85.

(*g*) *Subbammal* v. *Avudaiyammal* (1907) 30 Mad. 3.

(*h*) *Sarju Prasad* v. *Mangal* (1925) 47 All. 490, 492, 87 I.C. 294, ('25) A.A. 339.

(*i*) *Nirman Bahadur* v. *Fateh Bahadur* (1930) 52 All. 178, 126 I.C. 337, ('29) A.A. 963.

(*j*) *Sreemathi Rajlakshmi Dasee* v. *Bhola Nath Sen* (1938) 65 I.A. 365, (1938) 2 Cal. 653, ('38) A.PC. 254.

(*k*) *Maharajadhiraj Kameshwar Singh Bahadur* v. *Benimahadeb Singh* (1932) 11 Pat. 430., 134 I.C. 425, ('31) A.P. 422.

(*l*) *Mt. Ramjhrai Kuer* v. *Sheonarain Singh* (1934) 13 Pat. 297, 155 I.C. 750, ('34) A.P. 609.

(*m*) *Dul in Parbati Kuer* v. *Baijnath Prasad* (1935) 14 Pat. 518.

(*n*) *Nagendrabala Dassee* v. *Panchanam Mouris* (1933) 60 Cal. 1236, 149 I.C. 1053, ('34) A.C. 162.

(*o*) (1922) 49 I.A. 342, 1 Pat. 741, 69 I.C. 71, ('22) A.PC. 356.

Ss. 200, 201 suit by another reversioner. It is not material that the plaintiff in the second suit does not claim through the plaintiff in the first (*p*). See sec. 210.

The reason is that in such a suit the reversioner sues in his representative character and the decree against him operates as *res judicata* against the whole body of reversioners under the Code of Civil Procedure, s. 11, Expl. 6. It is, of course, understood, in order that the decree may operate as *res judicata* that the litigation is not collusive or vitiated by fraud or laches on the part of the next reversioner in conducting the suit or in asserting his reversionary right. The reversioners will be bound by the decree even if the decree be a consent decree provided the compromise is prudent and reasonable. In fact the matter is governed by the same principle as that enunciated in sec. 199.

201. Adverse possession against widow not adverse against next reversioner.—A person who has been in adverse possession for twelve years or upwards of property inherited by a widow from her husband by any act or omission in her part is not entitled on that ground to hold it adversely as against the next reversioner on the widow's death. The next reversioner is entitled to recover possession of the property, if it is immovable, within twelve years from the date of the widow's death under art. 141 of Schedule I of the Indian Limitation Act, 1908 and if it is movable, within six years from that date under art. 120 of that Act (*q*). Nor can there be any estoppel under sec. 41 of the Transfer of Property Act against the reversioner by reason of the widow's conduct (*r*) [ill. (a)]. See sec. 209.

But where a *decree* founded upon adverse possession has been obtained against the widow in her lifetime the next reversioner is barred and he does not get the benefit of art. 141 of the Limitation Act (*s*) [ill. (b)].

Illustrations.

(a) A Hindu dies in 1869 leaving two widows and a brother's son. He leaves a will whereby he bequeaths certain properties to trustees for *dharam*. The trustees enter into possession of the properties on the death of the testator. The surviving widow dies in 1888. In the same year, that is, more than 12 years after the death of the testator but within 12 years from the date of the surviving widow's death, the brother's son sues the trustees for possession of the properties, alleging that the trust for *dharam* is void. The suit is not barred even assuming that it would have been held barred if it had been brought by the widow. The brother's son, as reversioner, is entitled to sue for possession of the property; if it is immovable, within 12 years, and if it is movable, within 6 years from the widow's death. Where the property is immovable, art. 141 of the Limitation

(*p*) *Mata Prasad* v. *Nageshar Sahai* (1925) 52 I.A. 398, 47 All. 883, 91 I.C. 370, ('25) A.PC. 272 [consent-decree]; *Venkatanarayana* v. *Subbammal* (1915) 42 I.A. 125, 38 Mad. 406, 29 I.C. 298, ('15) A.PC. 124; *Bansidhar* v. *Dulhatia* (1925) 47 All. 505, 87 I.C. 235, ('25) A. A. 483.

(*q*) *Ranchordas* v. *Parvatibai* (1899) 23 Bom. 725, 26 I.A. 71; *Jaggo Bai* v. *Utsava Bai* (1929) 56 I.A. 267, 51 All. 439, 117 I.C. 498, ('29) A.PC. 166; *Bankey Lal* v. *Raghunath* (1929) 51 All. 189, 112 I.C. 801, ('28) A.A. 561; *Aurabinda Nath* v. *Manorama* (1928) 55 Cal. 903, 112 I.C. 496, ('28) A.C. 670, is no longer good law; *Badri Narayan* v. *Narayan Singh* (1943) Nag. 213, 206 I.C. 335, ('43) A.N. 193.

(*r*) *Shambu Prasad* v. *Mahadeo Prasad* (1933) 55 All. 554, 144 I.C. 293, ('33) A.A. 493.

(*s*) *Shivagunga* case (1863) 9 M. I. A. 539; *Vaithi linga* v. *Srirangath* (1925) 52 I.A. 322, 48 Mad. 883, 92 I.C. 85, ('25) A. PC. 249.

Act applies, and where it is movable, art. 120 applies: *Ranchordas* v. *Parvatibai* (1899) 23 Bom. 725, 26 I.A. 71.

(b) A Hindu belonging to the Sudra class died in 1849 leaving a widow *A*. In 1862, *A* adopted *B* as a son to her husband and put him in possession of the properties inherited by her from her husband. At that date there was no person who could give *B* in adoption and the adoption was invalid. *B* died in 1864. On his death his nephew, claiming as his heir, entered into possession of the properties. The nephew died in 1881. On his death the nephew's mother *M* entered into possession of the properties and held them until 1884 when *A* forcibly ejected her. In 1887, *M* brought a suit against *A* for possession of the properties. In 1892 a *decree* was passed for possession in favour of *M*, the Court holding that though *B*'s adoption was invalid, *M*'s claim for adverse possession for 12 years was established. *A* died in 1902. In 1905, the plaintiffs claiming to be the reversionary heirs of the original deceased, sued *M* for possession of the properties. The High Court dismissed the suit. On appeal to the Judicial Committee it was held that the principle of the *Shivgunga* case [see s. 199] applied and that the *decree* of 1892 against the widow (*A*) was binding upon the reversioners, the decree having been passed after a fair trial of the suit, and the appeal was dismissed: *Vaithialinga* v. *Srirangath* (1925) 52 I.A. 322, 48 Mad. 883, 92 I.C. 85, ('25) A.PC. 249.

III—REMEDIES AGAINST UNAUTHORISED ACTS OF WIDOWS AND OTHER LIMITED HEIRS.

202. Reversioners and their rights.—A reversionary heir, although having those contingent interests which can be differentiated little, if at all, from a *spes successionis* [s. 175], is recognized by Courts of law as having a right to demand that the estate be kept free from danger during its enjoyment by the widow or other limited heir. He may therefore sue to restrain a widow or other limited heir from committing waste or injuring the property [s. 204]. The reason why such a suit by a reversionary heir is allowed is that the suit is by him in a representative character and on behalf of all the reversioners, so that the corpus of the estate may pass unimpaired to those entitled to the reversion (*t*). For the same reason he may bring a suit for a declaration that an alienation effected by her is not binding on the reversion (*u*) [s. 205]. In both cases the right to sue is based on the *danger to the inheritance common to all the reversioners*, presumptive and contingent alike, the object being to forestall an injury which threatens the common interest of *all* the reversioners (*v*). Where a reversioner brings a representative suit for a declaration that an alienation by the widow is not binding on the reversion and dies, his right of suit survives not to his personal heirs but to the next presumptive reversioner (*w*).

(*t*) *Janaki Ammal* v. *Narayansami* (1916) 43 I.A. 207, 209-210, 39 Mad. 634, 638, 37 I.C. 161, ('16) A.PC. 117.

(*u*) *Venkatanarayanna* v. *Subbammal* (1915) 42 I.A. 125, 128-129, 38 Mad. 406, 410-411, 29 I.C. 298, ('15) A.PC. 124.

(*v*) *Ibid.*

(*w*) *Rameshwar* v. *Ganapati Devi* (1937) Lah. 525, 166 I.C. 753, ('36) A. L. 652.

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The next reversioner for the time being to the estate of a deceased Hindu, expectant upon the widow's death, is not entitled to a declaration under the Specific Relief Act, s. 42, that he is the next reversioner, although in that capacity he has the right to sue on behalf of the reversioners for the protection of the estate. Where, therefore, he sues the widow alleging waste [s. 204], but fails to prove any wrongful act on her part, a declaration that he is the next reversionary heir should not be made. The reason is that it is impossible to predicate until the succession opens who is the reversionary heir of the deceased proprietor, and such a declaration, if made, might be rendered valueless by the development of events (*x*). For the same reason if *A* sues *B* solely for a declaration that he (*A*) is the nearer reversioner, or that *B* is not a reversioner at all, the Court will refuse to make the declaration (*y*) [s. 203]. But if a reversioner sues a widow for an injunction to restrain waste [s. 204], or for a declaration that an alienation made by her is not binding on the reversion [s. 205], and the case is one in which the decree prayed for should be passed, the Court will pass a decree, though it may involve a finding that the plaintiff is a reversionary heir. Similarly, if a widow surrenders the whole estate to one of the reversioners [s. 197] and the plaintiffs claiming to be reversionary heirs equally with the grantee sue for a declaration that the surrender is not valid beyond the widow's lifetime, the Court may make the declaration, though it involves a finding that the plaintiffs equally with the grantee are the next reversioners (*z*).

203. Suit for a declaration that plaintiff is next reversioner.—The next reversioner for the time being to the estate of a deceased Hindu, expectant upon the widows' death, is not entitled to a declaration that he is the next reversioner, although in that capacity he has the right to sue on behalf of the reversioners for the protection of the estate as stated in secs. 204 and 205 below (*a*). Where a suit is brought on behalf of reversioners for a declaration that a transaction by the widow is not binding on them, the defendants may plead that the person whose reversioners the plaintiffs claim to be was not the last male owner and the defendants themselves are the reversioners of the last male owner and the matter may be tried in the suit (*b*).

This subject is explained fully in the notes to sec.¶

204. Injunction to restrain waste.—Where a widow or other limited heir in possession of property inherited by her commits waste or does any act which is injurious to the reversion, the next reversioner may institute a suit for a injunction restraining her from doing so. But the Court will not

(*x*) (1916) 43 I.A. 207, 39 Mad. 634, 37 I.C. 161, ('16) A.PC. 117, *supra*; *Sheoparsan* v. *Ramnandan* (1916) 43 I.A. 91, 43 Cal. 694, 33 I.C. 914, ('16) A.PC. 78.

(*y*) *Rama Rao* v. *Raja of Pitapur* (1919) 42 Mad. 219, 49 I.C. 835 ('19) A.M. 871; *Madan Mohan Dhur* v. *Th kur Sree Sree Natai Gour Jew* (1933) 37 C. W. N. 801, 147 I.C. 1247, ('34) A.C. 30.

(*z*) *Saudagar Singh* v. *Pardip Singh* (1918) 45 I.A. 21, 45 Cal. 510, 43 I.C. 484, ('17) A.PC. 196.

(*a*) *Janaki Ammal* v. *Narayanasami* (1916) 43 I.A. 207, 39 Mad. 634, 37 I.C. 161, ('16) A.PC. 117.

(*b*) *Desu Reddiar* v. *Srinivasa Reddi* (1936) 59 Mad. 1052, ('36) A.M. 605.

grant an injunction and will not take the management of the property out of her hands, unless the act complained of constitutes "danger to the property" (*c*).

Where the estate comprises moveable property, and the widow has squandered part thereof, the Court may appoint a receiver to prevent further waste of the estate; it may also direct transferees from the widow to replace the property where such property can be traced to their hands (*d*). If a widow gets bonds renewed in her own name in place of bonds that stood in her husband's favour and the recitals of the new bonds show as if consideration was paid in cash, this is clearly waste as far as the reversioner is concerned, which will justify the reversioner in filing a suit against the widow for a permanent injunction restraining her from withdrawing money deposited by her husband in the Post Office Savings Bank and directing her to renew the Post Office Cash Certificate of her husband or otherwise invest amounts due on them after maturity (*e*). See s. 179.

No injunction can be granted to restrain a widow or other limited heir from making an unauthorized *alienation* of the estate which she represents. Mere alienation is not waste. In such a case the proper remedy is to bring a suit for a declaratory decree as stated in the next section (*f*). See s. 202.

205. Declaratory suit in cases of unauthorised alienations.—(*1*) Where a widow or other limited heir alienates property inherited by her in contravention of the provisions of section 178, the next reversioner, though he has no interest higher than a chance of succession, may institute a suit in her lifetime for a declaration that the alienation is not binding on the reversion, and if the facts are proved, the Court may pass a decree declaring that the alienation is not valid beyond the lifetime of the limited heir (*g*) [ss. 175, 202]. As to limitation, see sec. 208.

(*2*) The reversioners, however, are not bound to institute a *declaratory suit*. They are not obliged to take any action in the lifetime of the limited heir. They may wait until the estate vests in them on her death, and then sue the alienee for *possession* of the property (*h*). As to limitation, see s. 209.

If a widow, without the consent of the reversioners, alienates her husband's property for purposes not sanctioned by law, the reversioners are entitled to bring a

(*c*) *Hurrydoss* v. *Sreemutty Uppoornah* (1856) 6 M.I.A. 433; *Kathama Nacthiar* v. *Doraisinga* (1875) 2 I.A. 169, 191, 15 Beng. L. R. 83, 119; *Renka* v. *Bhola Nath* (1915) 37 All. 177, 28 I.C. 896, ('15) A.A. 207; *Janaki Ammal* v. *Narayanasami* (1916) 43 I.A. 207, 39 Mad. 634, 37 I.C. 161, ('16) A.PC. 117. As to prospective waste, see *Ghambhirmal* v. *Hamirmal* (1897) 21 Bom. 747, at p. 749. See Specific Relief Act, 1877, s. 54, ill. (m).

(*d*) *Venkanna* v. *Narasimham* (1921) 44 Mad. 984, 66 I.C. 10, ('21) A.M. 234.

(*e*) *Sheo Das Pandey* v. *Mst. Ram Kali* (1936) 11 Luck. 508, 158 I.C. 301, ('36) A.O. 4.

(*f*) *Isri Dut* v. *Hansbuti* (1884) 10 Cal. 324, 332, 10 I.A. 150.

(*g*) *Gcolab Singh* v. *Kurun Singh* (1871) 14 M. I.A. 176; *Jumoona* v. *Bamasoondari* (1876) 1 Cal. 289, 3 I.A. 72; *Isri Dut* v. *Hunsbuti* (1883) 10 Cal. 324, 10 I.A. 150; *Saudagar Singh* v. *Pardip Singh* (1918) 45 I.A. 21, 45 Cal. 510, 43 I.C. 484, ('17) A.PC. 196, Specific Relief Act, 1877, s. 42, ill. (e).

(*h*) *Bijoy Gopal* v. *Krishna* (1907) 34 Cal. 329, 34 I.A. 87; *Mesraw* v. *Girjanundan* (1908) 12 C.W.N. 857; *Raghubir Singh* v. *Jethu* (1923) 2 Pat. 171, 70 I.C. 290, ('23) A.P. 130.

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declaratory suit against her (*i*). See s. 202 and notes. As to the effect of a decree in a declaratory suit, see s. 210 below.

Court-fee.—A suit by a reversioner after the widow's death for a declaration that an alienation made by the widow is not binding on him and for possession is governed by s. 7 (b) of the Court-fees Act, 1870 [suit for possession], and not by s. 7 (iv) (c) [declaratory suit]. The reason is that the reversioner is entitled to treat the alienation as a nullity and is not bound to ask for a declaration that the alienation is void (*j*).

206. Will by widow of property inherited by her from her husband.—The execution of a will by a widow or other limited heir purporting to dispose of property in which she takes a limited interest affords, as a general rule, no sufficient reason for granting a declaratory decree (*k*).

The reason is that a *will* made by a limited heir purporting to dispose of property inherited by her from a male does not operate as an *alienation* of the property. It is no more than an assertion, and a declaratory suit does not lie for the setting aside of a mere assertion (*l*). For the same reason, where a widow executes a deed by which she acknowledges that *A.B.* is the next reversioner, which in fact he is not, the Court will refuse to entertain a suit for a declaration by a person claiming to be the next reversioner that the deed is not binding on the estate (*m*). But where a widow claims property which really forms part of her husband's estate as her absolute property, alleging that she got it under a will of her husband's brother who had treated the property as his own, a suit will lie at the instance of the next reversioner for a declaration that the property belongs to the husband's estate and that she has no more than a widow's estate in it (*n*).

207. Who may sue for injunction or for declaratory decree.—It is not the law that any one who may have a possibility of succeeding on the death of a widow or other limited heir can maintain a suit for an injunction or for a declaratory decree; for otherwise every one in the line of succession, however remote, would have a right to sue. The right to sue rests in the first instance with the next reversioner. The reversioner next after him is not entitled to sue (*o*), unless—

(i) the next reversioner refuses without sufficient cause to institute proceedings, or has concurred in the act alleged to be wrongful, or has colluded

(*i*) (1883) 10 Cal. 324, 332-333, 10 I.A. 150, 156, 157, *supra*.

(*j*) *Ram Sumran* v. *Govind Das* (1923) 2 Pat. 125, 68 I.C. 700, ('22) A.P. 615 [F.B.].

(*k*) *Thakurain Jaipal* v. *Bhaiya Inder* (1904) 31 I.A. 67, 26 All. 238; *Umrao Kunwar* v. *Badri* (1915) 37 All. 422, 29 I.C. 302, ('15) A.A. 252; *Ganga* v. *Kanhai Lal* (1919) 41 All. 154, 47 I.C. 222, ('18) A.A. 15; *Das Mal* v. *Ram Chund* (1923) 4 Lah. 116, 76 I.C. 946, ('23) A.L. 406.

(*l*) *Rajah Nilmoney Singh* v. *Kally Churn* (1874) 23 W.R. 150.

(*m*) *Das Mal* v. *Ram Chund* (1923) 4 Lah. 116, 76 I.C. 946, ('23) A.L. 406.

(*n*) *Surayya* v. *Subbamma* (1920) 43 Mad. 4, 53 I.C. 498, ('20) A.M. 361.

(*o*) *Rani Anand Koer* v. *The Court of Wards* (1881) 6 Cal. 764, 8 I.A. 14; *Meguh Rai* v. *Ram Khelavan* (1913) 35 All. 326, 9 I.C. 814; *Gummanan* v. *Jahangira* (1918) 40 All. 518; 46 I. C. 186, ('18) A.A. 392; *Abinash* v. *Harinath* (1905) 32 Cal. 62 [not good law on the point of limitation, see s. 208]; *Mussammat Viranwali* v. *Kundan Lal* (1928) 9 Lah. 106, 112 I.C. 35, ('28) A. L. 287; *Shankar* v. *Zaghoba* (1939) Nag. 383; *Matru Mal* v. *Meheri Kunwar* (1940) All. 416, 189 I.C. 600, ('40) A.S. 311, (1940) A.L.J. 403. 13 I.R. 106; *Lalta Prasad* v. *Dwarka Prasad* (1941) All. 598, 195 I.C. 492, ('41) A.A. 313, (1941) A.L.J. 392; *Raja Seetlo Baksh Singh* v. *Babu Surrendra Bikram Singh* (1943) 18 Luck. 521, 205 I.C. 585, ('43) A.O. 68.

with the limited heir, or is precluded from suing by his own act or conduct (*p*), or is from poverty not in a position to sue (*q*); *or* **S. 207**

(ii) according to the Calcutta (*r*), Madras (*s*), and Patna (*t*) decisions, the next reversioner is herself a female and entitled to a limited interest only. The same view has been taken by the Allahabad High Court in some cases (*u*), in other cases it has been held that the mere fact that the next reversioner is a female does not give any right of suit to the more distant reversioner, unless it be shown that she was acting in collusion with the widow or other limited heir whose act is impeached (*v*).

In one case it was held that this rule is not absolute and that there may be circumstances under which the distant reversioner may be permitted to sue where the immediate reversioner is a female and in that case the declaration was granted (*w*).

Parties to suit.—In a case where a suit is brought by a remote reversioner, upon a plaint stating the circumstances under which he has such claims to sue, the Court must exercise a judicial discretion in determining whether he is entitled to sue, and would probably require the next reversioner to be made a party to the suit. Where the plaintiff brought the suit claiming to be the next reversioner and the whole case was tried by the lower courts which declared that the alienation by the widow was not valid beyond her lifetime and in Second Appeal the High Court found that on account of Act II of 1929, the plaintiff was not the nearest reversioner, a sister's son having come into existence after the institution of the suit, it was held that the suit ought not to be dismissed but the case should be sent back for disposal after making the sister's son a party and getting a proper guardian appointed for him (*x*). But where the plaintiff sues as the next reversioner, it is improper to read into the plaint an allegation that he is bringing the suit as a remote reversioner because the nearer reversioners have either precluded themselves from bringing the suit or have refused to do so (*y*).

Where a suit is brought by the next reversioner, there is nothing to preclude a remote reversioner from joining o[illegible] has [illegible] be joined in the suit, or even obtaining the conduct

(*p*) *Kooer Goolab Singh* v. *Rao Kurun Singh* (1871) 14 M.I.A. 176; *Rao Kurun Singh* v. *Nawab Mahomed* (1871) 14 M.I.A. 187, 193; *Bakhtawar* v. *Bhagwana* (1910) 32 All. 176, 5 I.C. 270 [*gift* with consent of next reversioner]; *Raja Dei* v. *Umed Singh* (1912) 34 All. 207, 13 I.C. 632; *Ghisiawan* v. *Mst. Raj Kummari* (1921) 43 All. 534, 63 I.C. 556, ('21) A.A. 33 [sale with consent of next reversioner]; *Bhikaji* v. *Jagannath* (1873) 10 Bom. H.C. 351 [waiver].

(*q*) *Mata Prasad* v. *Nageshar Sahai* (1925) 52 I.A. 398, 47 All. 883, 91 I.C. 370, ('25) A.PC. 272.

(*r*) *Abinash* v. *Harinath* (1905) 32 Cal. 62.

(*s*) *Chidambara* v. *Nallammal* (1910) 33 Mad. 410, 5 I.C. 164.

(*t*) *Ramyad* v. *Rambhilhara* (1919) 4 Pat. L. J. 734, 54 I.C. 357, ('20) A.P. 514.

(*u*) *Balgobind* v. *Ram Kumar* (1884) 6 All. 431; *Lakhpati* v. *Rambodh* (1915) 37 All. 350, 352, 29 I.C. 218, ('15) A.A. 255.

(*v*) *Ishwar* v. *Janki* (1893) 15 All. 132; *Madari* v. *Malki* (1884) 6 All. 428; *Gumanan* v. *Jahangira* (1918) 40 All. 518, 46 I.C. 186, ('18) A.A. 393. See also *Tekchand* v. *Soman Singh* (1916) Punj. Rec. No. 27, 34 I.C. 831, ('16) A.L. 265.

(*w*) *Deoki* v. *Jwala Prasad* (1928) 50 All. 678, 113 I.C. 737, ('28) A.A. 216.

(*x*) *Lakshmi* v. *Anantarama* (1937) Mad. 948, 171 I. C. 7, ('37) A.M. 699.

(*y*) *Rani Anand Koer* v *The Court of Wards* (1881) 6 Cal. 764, 772-773, 8 I.A. 14; *Meghu Rai* v. *Ram Khelawan* (1913) 35 All. 326, 19 I.C. 814; *Jhandu* v. *Tarif* (1915) 37 All. 45, 27 I.C. 892, ('14) A.PC. 34; *Sita Saran* v. *Jagat* (1927) 49 All. 815, 102 I.C. 296, ('27) A.A. 811; *Mussammat Viranwali* v. *Kundan Lal* (1928) 9 Lah. 106, 112 I.C. 35, ('28) A.L. 267.

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of the suit on proof of laches on the part of the plaintiff or collusion between him and the widow (z), as for instance, an attempt to compromise the suit with the widow in appeal after the lower court had passed a decree granting the declaration prayed for in the suit (a).

Minor reversioner.—The fact that the next reversioner is a *minor* will not justify a suit by a more distant reversioner. The reason is that a minor can bring a suit by a next friend (b).

Next reversioner refusing to sue.—Where a Hindu was induced by his wife to execute a fictitious mortgage of his property to her nephew, and she, after his death, refused to take any action in the matter, it was held that the next reversioner was entitled to bring a suit for a declaration that the mortgage was fictitious and did not affect his interest in the property (c).

Persons entitled to impeach unauthorized alienations by widow.—See sec. 185A.

208. Declaratory suits and limitation.—(*1*) A suit by a reversioner for a declaration that an alienation made by a widow or other limited heir is void except for her life must be brought within 12 years from the date of the alienation [the Indian Limitation Act, 1908, Sch. I, art. 125] but a suit by a Hindu for a declaration that the alienations made by a Hindu female who has a life estate by virtue of a transfer or grant *inter vivos* or by virtue of a bequest are void and are not binding on him as the next reversioner of the last male owner is governed by Art. 120 and not by Art. 125 (*d*), differing from the Lahore High Court (*e*).

(*2*) Such a suit is a representative suit on behalf of all the reversioners, then existing or thereafter to be born, and all of them have but a single cause of action, which arises on the date of the alienation. Hence if no suit is brought by the existing reversioners within 12 years, and their right to sue is barred by limitation, reversioners thereafter born are equally barred (*f*).

It was held in some cases that because reversioners derived title from the last owner and not from each other, they had each an independent cause of action. But this view was pronounced to be unsound by Sir Barnes Peacock so far back as 1868 (*g*). The ground of the decision was that the right of the next reversioner to bring a declaratory

(z) *Venkatanarayana* v. *Subbamal* (1915) 42 I. A. 125, 38 Mad. 406, 29 I.C. 298, ('15) A.PC. 124.

(a) *Gokulananda Harichandan* v. *Iswar Chhotrai* (1936) 15 Pat. 379, 166 I. C. 342, ('37) A. P. 11.

(b) *Kali Charam* v. *Bageshra* (1925) 47 All. 929, 89 I.C. 374, ('25) A.A. 585.

(c) *Suraj Mal* v. *Nathwa* (1923) 45 All. 255, 76 I.C. 983, ('23) A.A. 161.

(d) *Kanhya Lal Missir* v. *Mst. Hira Bibi* (1936) 15 Pat. 151, 163 I.C. 940, ('36) A. P. 323.

(e) *Mt. Nandan* v. *Wazira* (1927) 8 Lah. 215; *Mt. Widyavati* v. *Mt. Rahmat Bi* ('37) A. Lah. 760.

(f) *Varamma* v. *Gopaladasayya* (1918) 41 Mad. 659, 46 I. C. 202, ('19) A.M. 911 (F.B.), approved, and *ratio decidendi* followed in *Kesho Prasad* v. *Sheo Pargash* (1922) 44 All. 19, 29, 64 I.C. 248, ('22) A.A. 301 (F.B.); *Chhaganram* v. *Bai Motigavri* (1890) 14 Bom. 1900; *Jamnabi* v. *Dharsey* (1902) 4 Bom. L.R. 893 [adoption]; *Chiragh Din* v. *Abdullah* (1925) 6 Lah. 405, 90 I.C. 1022, ('25) A.L. 654.

(g) *Nobin Chunder* v. *Issur Chunder* (1868) 9 W.R. 505, 509.

suit is based on the danger to the inheritance *common* to all the reversioners, presumptive and contingent alike, and there is therefore *one* cause of action common to them all (*h*). See sec. 202.

The High Court of Calcutta has held that what bars the next reversioner does not bar the contingent reversioner (*i*). In one of these cases a daughter while a minor succeeded to her father's estate. *X.Y.* was appointed guardian of her property. In 1897 *X.Y.* sold one of the properties to *A.B.* The daughter did not take any steps to set aside the alienation after she attained majority. In 1916 the plaintiff who was the minor son of another daughter sued *A.B.* for a declaration that the sale was not binding on the estate after the death of the daughter, *i.e.*, his mother's sister. It was held that art. 120, and not art. 125, of the Indian Limitation Act, 1908, applied to the case, and that the suit was not time-barred (*j*).

209. Reversioner's suit for possession and limitation.—A suit by reversioners, entitled to succeed to the estate on the death of a widow or other limited heir, for possession of *immoveable* property from an alienee from her must be brought within twelve years from her death [the Indian Limitation Act, 1908, Sch. I, art. 141], and of moveable property, within six years from that date (*k*) [*ib.*, art. 120]. See sec. 205 (*2*).

The reversioner may sue for *possession* without suing to have the alienation set aside. The reason is that he is entitled to treat the unauthorized alienation as a *nullity* without the intervention of any Court(*l*).

Article 141 of Schedule I of the Indian Limitation Act, 1908, referred to in this section provides a period of 12 years for a suit for possession of immoveable property by a Hindu entitled to possession of such property on the *death* of a Hindu female. In an award arising out of a dispute between a widow and her husband's brothers, certain properties were given to her for maintenance and it was provided that she should forfeit her right to the properties if she became unchaste. The widow became unchaste in 1910 or 1912 and died in 1929. It was held that a suit brought in 1932, that is, within 12 years after her death was in time under art. 141 on the ground that the reversioners are entitled to waive the benefit of the forfeiture (*m*). For an application of this art. 141, see sec. 201.

210. Decree in suit between next reversioner and alienee and res judicata.—A suit by the next reversioner against the widow or other limited heir and an alienee from her for a declaration that the alienation is not binding on the reversioner is a representative suit on behalf of all the reversioners, and a decree fairly and properly passed in such a suit, whether it is for or against the next reversioner, operates as *res judicata* between not only the next reversioner but *the whole body of reversioners* on the one hand and the alienee and his represen-

(*h*) *Mata Prasad* v. *Nageshar Sahai* (1925) 52 I.A. 398, 410-411, 47 All. 883, 893-894, 91 I.C. 370, ('25) A.PC. 272.

(*i*) *Abinash* v. *Harinath* (1905) 32 Cal. 62; *Das Ram* v. *Tirtha Nath* (1924) 51 Cal. 101, 108-109, 81 I.C. 522, ('24) A.C. 481.

(*j*) (1924) 51 Cal. 101, 81 I.C. 522, ('24) A.C. 481, *supra*.

(*k*) *Bijoy Gopal* v. *Krishna* (1907) 34 Cal. 329, 34 I. A. 87; *Ranchordas* v. *Parvatibai* (1899) 23 Bom. 725, 26 I.A. 71; *Ram Dei* v. *Abu Jafar* (1905) 27 All. 494; *Rakhmabai* v. *Keshav* (1907) 31 Bom. 1.

(*l*) (1907) 34 Cal. 329, 34 I.A. 87, *supra*; *Obala Kondama* v. *Kandasami* (1924) 51 I. A. 145, 152, 47 Mad. 181, 189, 79 I. C. 961, ('24) A.PC. 56.

(*m*) *Rashik Lal* v. *Radha Dulaiya* (1937) All. 424, 169 I.C. 586, ('37) A.A. 268.

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tatives on the other (*n*). This principle applies also when a creditor obtains a decree against a widow and attaches properties inherited by her from her husband; in such a case if the reversioner brings a suit for the release of the property on the ground that debts were not incurred for legal necessity and therefore not binding on the reversion, a fresh suit by him for a declaration that the sale of the property in execution is not binding on him is *res judicata* (*o*).

Illustrations.

(a) A Hindu dies leaving a widow, a brother, and a paternal uncle. The widow sells property inherited by her from her husband to *A*, and delivers possession of the property to him. The brother as next reversioner sues the widow and *A* for a declaration that the sale is not valid beyond the widow's lifetime, and a decree is passed in favour of the brother. After the decree the widow dies, and then the brother. The uncle demands possession of the property from *A*, but *A* fails to deliver possession. The uncle sues *A* for possession. *A* is precluded from contending that the sale was valid, and the uncle is entitled to possession.

(b) If in the case put in ill. (a), the brother's suit is dismissed and the alienation is upheld, the uncle will be precluded from bringing a fresh suit against *A* for a declaration that the alienation is not binding on him. The decree of dismissal operates as *res judicata* against the uncle, who is the ultimate reversioner, *though he was not a party eo nomine to the brother's suit*, and the alienee is entitled to the benefit of the decree. It may seem hard at first sight that a decree against the next reversioner, whose interest is merely presumptive and may never mature as when he dies before the widow, should operate as *res judicata* against the ultimate reversioner at the widow's death, for the decree might have been obtained by fraud or collusion. But the hardship is not real, for the decree in such a case may be set aside at the suit of the ultimate reversioner (*p*).

A decree against the next reversioner in respect of an alienation by the widow of property *X* to *A* does not bar a suit by the reversioner in respect of an alienation of property *Y* to *B* (*q*).

For the reason of the rule contained in this section, see s. 202. The same principle applies to a suit by the next reversioner for a declaration that an *adoption* is invalid. If a decree is passed against him, it is binding on the *ultimate* reversioner (*r*). The matter is really governed by the Code of Civil Procedure, 1908, s. 11, Expln. 6, which relates to *res judicata* in a representative suit. As [illegible]rees against limited heirs, see s. 199.

211. Adverse possession by widow.—(*1*) Property acquired by a Hindu widow or other limited heir by adverse possession [Indian Limitation Act, 1908, sch. i, art. 144], of which she took and retained possession absolutely in her

(*n*) *Kesho Prasad* v. *Sheo Pragash* (1924) 51 I.A. 381, 46 All. 831, 82 I.C. 962, ('24) A. PC. 247, [decree for next reversioner], affg. (1922) 44 All. 19, 64 I.C. 248 ('22) A. A. 301 (F. B.); *Pramatha* v. *Bhuban* (1922) 49 Cal. 45, 64 I.C. 980, ('22) A.C. 321, [decree against next reversioner]; *Khair Muhammad* v. *Umar* (1924) 5 Lah. 421, 84 I. C. 477, ('25) A. L. 89, [decree against next reversioner].

(*o*) *Mst. Seethabai* v. *Hari* (1938) Nag. 498, ('38) A. N. 401.

(*p*) *Kesho Prasad* v. *Sheo Pragash* (1924) 51 I.A. 381, 46 All. 831, 82 I. C. 962, ('24) A.PC. 247.

(*q*) *Thakar Singh* v. *Mst. Uttam* (1929) 10 Lah. 613, 118 I.C. 449, ('29) A.L. 295.

(*r*) *Chiruvolu* v. *Chiruvolu* (1906) 29 Mad. 390 [F.B.]; *Gokulanand Harichandan* v. *Iswar Chhotrai* (1936) 15 Pat. 379, 166 I.C. 342, ('37) A. P. 11.

own right, for twelve years or upwards is her stridhana, and she may dispose of it by deed or will; on her death intestate it descends to her stridhana heirs (*s*). But if the property acquired by adverse possession was claimed and held by her not in her own right, but as a widow representing her husband's estate, it is not her stridhana, but an accretion to her husband's estate, and in it she takes no more than a widow's estate, and it descends on her death to her husband's heirs (*t*). The possession of a person who is not the widow of the last male owner but is the widow of an another member of the family is *prima facie adverse* but if she claims the estate only by inheritance she must be deemed to be claiming only a limited estate (*u*). Thus, where a Hindu widow in the enjoyment of her husband's estate as heir remarried and had thereby forfeited her title to the estate, but continued in possession without asserting any change in the character of her possession, she acquires title by prescription only to a widow's estate and not to an absolute estate (*v*). **S. 211**

It has accordingly been held that where a Hindu dies leaving a son and a widow and the widow who is entitled to maintenance only out of her husband's estate takes and retains possession of property belonging to her husband's estate adversely to the son, the property is her stridhana, unless it is clearly shown that when she took possession, she professed to do it as claiming only the limited estate of a widow. "The son having the title, she could not take possession excluding him, unless she intended to take an adverse possession, a possession to which she was not in any way entitled" (*w*) Similarly where a widow takes possession of the estate of her husband's uncle to which her husband's grandsons are entitled (*x*), or takes possession of the estate of her husband's brother to which the brother's heirs are entitled (*y*), and holds it adversely against the rightful heirs, the property is her stridhana. In a Privy Council case where a Hindu widow executed a deed of gift of property which she held absolutely under a will from her husband in favour of her daughter, which gift was not valid as the deed was not registered, but the daughter remained in adverse possession of the property for upwards of 12 years, it was held that the property was her stridhana and that it did not pass on her death to her father's heirs.

(2) The possession of a portion of the joint family estate by the widow of a member of a joint Hindu family governed by

(*s*) *Lacchan Kunwar* v. *Manorath Ram* (1895) 22 Cal. 445 [P. C.]; *Varada Pillai* v. *Jeeverathnammal* (1920) 43 Mad. 244, 46 I.A. 285, 53 I.C. 901, ('19) A.PC. 41; *Bansidhar* v. *Dulhatia* (1925) 47 All. 505, 87 I.C. 235, ('25) A.A. 483; *Rikhdeo* v. *Sukhdeo* (1927) 49 All. 713, 102 I.C. 175, ('28) A.A. 45; *Suraj Balli* v. *Tilakdhari* (1928) 7 Pat. 163, 107 I.C. 151, ('28) A.P. 220; *Musammat Maluka* v. *Pateshar* (1926) 1 Luck. 273, 295-296, 96 I.C. 672, ('26) A. O. 371.

(*t*) *Lajwanti* v. *Safa Chand* (1924) 51 I.A. 171, 5 Lah. 192, 80 I.C. 788, ('24) A.PC. 121; *Patipal Singh* v. *Rampal Singh* (1940) 15 Luck. 112, 185 I.C. 157, ('40) A.O. 63.

(*u*) *Chandrabali Pathak* v. *Bhagwanprasad Pande* (1944) All. 533.

(*v*) *Parbati* v. *Ram Prasad* (1932) 7 Luck. 320, 141 I.C. 831, ('33) A.O. 92.

(*w*) *Lacchan Kunwar* v. *Manorath Ram* (1895) 22 Cal 445, 449; (1925) 47 All. 505, 87 I.C. 235, ('25) A.A. 483, *supra*.

(*x*) *Rikdeo* v. *Sukhdeo* (1927) 49 All. 713, 102 I.C. 175, ('28) A.A. 45.

(*y*) *Suraj Balli* v. *Tilakdhari* (1928) 7 Pat. 163, 107 I.C. 151, ('28) A P. 220.

(*z*) *Varada Pillai* v. *Jeeverathnammal* (1920) 46 I.A. 285, 43 Mad. 244, 53 I.C. 901; *Mst. Maluka* v. *Pateshar* (1926) 1 Luck. 273, 96 I.C. 672, ('26) A. O. 371, *supra*.

S. 211 the Mitakshara law, as of right, for twelve years or upwards, as for instance, where mutation has been effected in her name and she remains in continuous possession, bars the claims of the other members of the family (*a*). The reason is that on the death of an undivided member of a joint family, the joint family property passes to the other members of the family by survivorship, and the widow is not entitled to anything more than maintenance out of the joint family property; her possession, therefore, would be adverse to the other members unless it was in lieu of maintenance under an arrangement with them (*b*). See sec. 133. But a widow having obtained possession of property under an arrangement with her husband's brothers granting her a widow's estate, cannot by any act or declaration of her own acquire title by prescription. *Cf.* S. 176 (*7*) (*c*).

(*a*) *Pandit Adya Shankar Tivari* v. *Mst. Chandravath* (1935) 10 Luck. 35, 150 I. C. 519, ('34) A. O. 265.

(*b*) *Sham Koer* v. *Dah Koer* (1902) 29 I.A. 132, 29 Cal 664. *Satgur Prashad* v. *Kishore Lal* (1919) 46 I. A. 197, 42 All. 152, 55 I. C 486, ('19) A.PC. 60; *Uman Shankar* v. *Musammat Aisha* (1923) 45 All. 729, 74 I.C. 869, ('24) A.A. 88; *Kali Charan* v. *Piari* (1924) 46 All. 769, 83 I.C. 754, ('24) A.A. 740.

(*c*) *Rashiklal* v. *Radha Dulaiya* (1937) All. 424, 169 I.C. 586, ('37) A.A. 268.

CHAPTER XII.

COPARCENERS AND COPARCENARY PROPERTY— MITAKSHARA LAW.

I. COPARCENERS.

212. Joint Hindu family.—(*1*) A joint Hindu family consists of all persons lineally descended from a common ancestor, and include their wives and unmarried daughters (*d*). A daughter ceases to be a member of her father's family on marriage, and becomes a member of her husband's family. **Ss. 212, 213**

(*2*) The joint and undivided family is the normal condition of Hindu society. An undivided Hindu family is ordinarily joint not only in estate, but also in food and worship (*e*). The existence of joint estate is not an essential requisite to constitute a joint family and a family which does not own any property may nevertheless be joint (*f*). Where there is joint estate, and the members of the family become separate *in estate*, the family ceases to be joint. Mere severance *in food* and *worship* does not operate as a separation (*g*).

Possession of joint family property is not a necessary requisite for the constitution of a joint Hindu family. Hindus get a joint family status by birth, and the joint family property is only an adjunct of the joint family (*h*).

Almost every Hindu family has a family idol which is the joint property of the family. As to the worship of family *idols* on partition, see notes to s. 303.

213. Hindu coparcenary.—A Hindu coparcenary is a much *narrower* body than the joint family. It includes only those persons *who acquire by birth an interest in the joint or coparcenary property* (*i*). These are the sons, grandsons and

(*d*) *Commissioner of Income Tax* v. *Luxminarayan* (1935) 59 Bom. 618, 37 Bom. L. R. 692, 159 I.C. 424, ('35) A.B. 412.

(*e*) *Sri Raghunadha* v. *Brozo Kishoro* (1876) 1 Mad. 69, 81, 3 I.A. 154.

(*f*) *Janakiram* v. *Nagamony* (1926) 49 Mad. 98, 103, 115, 93 I.C. 662, ('26) A.M. 273; *Laldas* v. *Motibai* (1908) 10 Bom. L. R. 175; *Pandit Mohanlal* v. *Pandit Ramdayal* (1941) 16 Luck. 708, 194 I.C. 61, ('41) A.O. 331.

(*g*) *Chowdhry Ganesh Dutt* v. *Jewach* (1904) 31 Cal. 262, 31 I.A. 10.

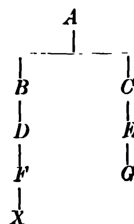
(*h*) (1926) 49 Mad. 98, 103, 115, 93 I.C. 662, ('26) A.M. 273, *supra*.

(*i*) *Commissioner of Income Tax* v. *Luxminarayan* (1935) 59 Bom. 618, 37 Bom. L. R. 692, 159 I.C. 424, ('35) A.B. 412.

S. 213 great-grandsons of the holder of the joint property for the time being, in other words, the three generations next to the holder in unbroken male descent. See s. 217.

To understand the formation of a coparcenary, it is important to note the distinction between ancestral property and separate property. Property inherited by a Hindu from his father, father's father or father's father's father, is *ancestral* property. Property inherited by him from other relations is his separate property. The essential feature of ancestral property is that if the person inheriting it has sons, grandsons or great-grandsons, they become joint owners with him. They become entitled to it by *reason of their birth* (j). Thus if A, who has a son B, inherits property from his father, it becomes ancestral in his hands, and though A, as the head of the family, is entitled to *hold and manage* the property, B is entitled to an equal interest in the property with his father (A), and to enjoy it in common with him. B can therefore *restrain his father from alienating* it except in the special cases where such alienation is allowed by law, and he *can enforce partition* of it against his father. On his father's death, he takes the property by right of *survivorship* and not by *succession*. It is otherwise, however, as to *separate* property. A man is the absolute owner of property inherited by him from his brother, uncle, etc. His son does not acquire an interest in it by birth, and on his death it passes to the son not by *survivorship* but by *succession*. Thus if A inherits property from his brother, it is his separate property, and it is absolutely at his disposal. His son B acquires no interest in it by birth, and he cannot claim a partition of it, nor can he restrain A from alienating it. The same rule applies to the *self-acquired* property of a Hindu. But it is of the utmost importance to remember that separate or self-acquired property, *once it descends to the male issue of the owner*, becomes *ancestral* in the hands of the male issue who inherits it. Thus if A owns separate or self-acquired property, it will pass on his death to his son B as his *heir*. But in the hands of B it is *ancestral* property as regards his sons. The result is that if B has a son C, C takes an interest in it by reason of his birth, and he can restrain B from alienating it, and can enforce a partition of it as against B.

Ancestral property is a species of coparcenary property. We have stated above that if a Hindu *inherits* property from his father, it becomes ancestral in his hands as regards his son. In such a case it is said that the son becomes a coparcener with the father as regards the property so inherited, and the coparcenary consists of the father and the son. But this does not mean that a coparcenary can consist only of a father and his sons. It is not only the sons, but also the grandsons and great-grandsons who acquire an interest by birth in the coparcenary property. Thus if A inherits property from his father, and he has two sons B and C, they both become coparceners with him as regards the ancestral property. A, as the head of the family, is entitled to hold the property and to manage it, and hence he is called the *manager* of the property. If B has a son D, and C has a son E, the coparcenary will consist of the father, sons, and grandsons, namely A, B, C, D and E, as shown in the accompanying diagram. Further, if D has a son F, and E has a son G, the coparcenary will consist of the father, sons, grandsons, and great-grandsons, in all it will consist of seven members. But if F has a son X, X does not become a coparcener, for a coparcenary is limited to the head of each stock, and his sons, grandsons, and great-grandsons. X being the *great-great-grandson* of A, cannot be a member of the coparcenary so long as A, the holder of the joint property, is alive.



(j) *Sundar Lal* v. *Chhitar Mal* (1907) 29 All. 1; *Anandrao* v. *Vasantrao* (1907) 9 Bom. L. R. 595 [P.C.].

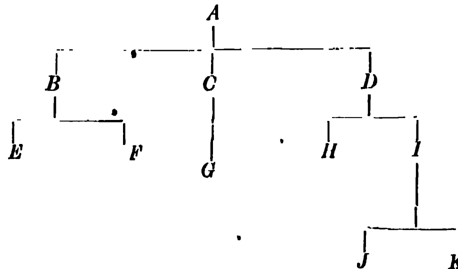
214. Formation of coparcenary.—(*1*) The conception of a joint Hindu family constituting a coparcenary is that of a common male ancestor with his lineal descendants in the male line within *four* degrees *counting from and inclusive of* such ancestor (or *three* degrees *exclusive* of the ancestor). No coparcenary can commence without a common male ancestor, though after his death it may consist of *collaterals*, such as brothers, uncles and nephews, cousins, etc. **S. 214**

(*2*) A coparcenary is purely a creature of law; it cannot be created by act of parties, save in so far that by adoption a stranger may be introduced as a member thereof (*k*).

Illustrations.

(a) A coparcenary may consist entirely of *collateral* relations. Thus suppose a coparcenary to consist of *A* and his sons *B* and *C*. *After A*'s death, if *B* and *C* continue joint, the coparcenary will consist of two *collaterals*, that is, the brothers, *B* and *C*.

(b) The following diagram shows a coparcenary consisting of several families. *A* with his three sons *B*, *C* and *D* and their sons and grandsons constitute the "main"



family. *B* with his two sons *E* and *F*, *C* with his son *G*, *D* with his sons *H* and *I* and his grandsons *J* and *K*, and *I* with his sons *J* and *K*, constitute "branch" families. All the families have one common ancestor *A*. Each branch family has also its own head, namely *B*, *C*, *D* and *I*. On *A*'s death the coparcenary will consist of the three *brothers B*, *C* and *D* and their male issue. On the death of *B* and *C*, the coparcenary will consist of *D*, his *nephews E*, *F* and *G*, and his male issue *H*, *I*, *J* and *K* who stand in the relation of *cousins* to *E*, *F* and *G*.

Genesis of a coparcenary.—A coparcenary is created in some such way as the following:—A Hindu male *A*, who has inherited no property at all from his father, grandfather, or great-grandfather, acquires property by his own exertions. *A* has a son *B*, *B* does not take any vested interest in the self-acquired property of *A* during *A*'s lifetime, but on *A*'s death he *inherits* the self-acquired property of *A*. If *B* has a son *C*, *C* takes a vested interest in the property by reason of his birth, and the property inherited by *B* from his father *A* becomes ancestral property in his (*B*'s) hands, and *B* and *C* are coparceners as regards the property. If *B* and *C* continue joint, and a son *D* is born to *C*, he enters the coparcenary by the mere fact of his birth. And if a son *E* is subsequently born to *D*, he too becomes a coparcener. But *E*'s son cannot be a coparcener while *B* is alive, he being more than *four* degrees removed from *B*.

(*k*) *Sudarsanam* v. *Narasimhulu* (1902) 25 Mad. 149, 154-157.

S. 215

215. Coparcenary not limited to four degrees from common ancestor.—Though every coparcenary must have a common ancestor to start with, it is not to be supposed that every coparcenary is limited to *four* degrees from the *common ancestor.* A member of a joint family may be removed *more than four* degrees from the common ancestor (*original* holder of coparcenary property), and yet he may be a coparcener. Whether he is so or not depends on the answer to the question whether he can *demand a partition* of the coparcenary property. If he can, he is a coparcener, but not otherwise. The rule is that partition can be demanded by any member of a joint family who is not removed more than four degrees from the *last* holder, however remote he may be from the common ancestor or *original* holder of the property. When a member of a joint family is removed more than four degrees from the *last* holder, he cannot demand a partition, and therefore he is not a coparcener [ills. (a) and (b)]. On the death, however, of the *last* holder, he would become a member of the coparcenary, if he was *fifth* in descent from him, and would be entitled to a share on partition, *unless* his father, grandfather and great-grandfather had all predeceased the *last* holder. The reason is—and here we have another important rule bearing on the subject in hand—that whenever a break of more than three degrees occurs between any holder of property [*A* in ill. (d)] and the person who claims to enter the coparcenary after his death [*E* in ill. (d)], the line ceases in that direction [*i.e.*, the direction of *C*, *D*1 and *E* in ill. (d)] and the survivorship is confined to those collaterals and descendants [*D* in ill. (d)] who are within the limit of four degrees (*l*) [ills. (c) and (d)].

Illustrations.

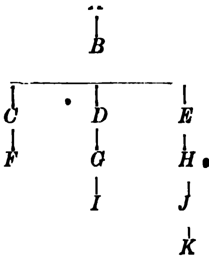
(a) *A* inherits certain property from his father *X*. He has a son *B* and a grandson *C*, both members of an undivided family. *A*, *B* and *C* are coparceners. A son *D* is then born to *C*. *D* becomes a coparcener by birth with *A*, *B* and *C*. Subsequently a son *E* is born to *D*. *E* is not a coparcener, for being *fifth* in descent from *A*, he cannot demand a partition of the family property. On *A*'s death, however, *B* will become the head of the joint family and *E* will step into the coparcenary as the great-grandson of *B*, though he is *fifth* in descent from *A*, the *original* holder. Likewise, on *B*'s death, *F* (*E*'s son) will step into the coparcenary as great-grandson of *C*, the head of the family for the time being, though he is *sixth* in descent from *A*, the *original holder.*

A
|
B
|
C
|
D
|
E
|
F

(*l*) *Moro Vishvanath* v. *Ganesh* (1873) 10 Bom. H. C. 444, *Yenumula* v. *Yenumula* (1870) 6 Mad. H. C. 93.

Note that the property inherited by *A* from his *father* is ancestral in his hands. He is not the owner of the property; he is entitled merely to hold and manage the property as the head of the family for and on behalf of the family. The ownership of the property is in the joint family consisting of himself and his three descendants *B*, *C* and *D*. They are all co-owners, or, as the expression goes, coparceners. On *A*'s death the family being still joint, the management of the property will pass to *B* as senior member of the family, in other words, *B* will be the *karta* or manager of the joint family and he will hold the property on behalf of himself and his three descendants, *C*, *D* and *E*. Likewise, on *B*'s death the property will vest in *C* and his three descendants *D*, *E* and *F* as coparceners. It may thus go on for generations until the family becomes divided or becomes extinct on the death of the sole surviving coparcener. **S. 215**

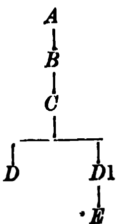
(b) Suppose a coparcenary consisted originally of *A*, *B*, *C*, *D*, *E*, *F*, *G* and *H*, with *A* as the common ancestor.—Suppose *A* dies first, then *B*, then *C*, then D, and then *E*, and that *G* has then a son *I*, and *H* has a son *J*, and *J* has a son *K*. On *E*'s death the coparcenary will consist of *F*, *G*, *H*, *I*, *J* and *K*. Suppose that *G*, *H* and *J* die one after another, and the only survivors of the joint family are *F*, *I* and *K*. Are *I* and *K* coparceners with *F*? Yes, though *I* is *fifth* in descent from *A*, and *K* is *sixth* in descent from *A*. The reason is that either of them *can demand a partition* of the family property from *F*. Here the coparcenary consists of three *collaterals, namely*, *F*, *I* and *K* (*m*).



(c) *A* inherits certain property from his father *X*. *A* has a son *B*, a grandson *C*, a great-grandson *D*, and a great-great-grandson *E*. *A*, *B*, *C* and *D* are coparceners; *E* is not. On *A*'s death, however, *E* will step into the coparcenary of which *B* will become the head. On *B*'s death after *A*, the coparcenary will consist of *C*, *D* and *E* with *C* as the head. On *C*'s death after *A* and *B*, the coparcenary will consist of *D* and *E* with *D* as the head. *Suppose now that B, C, and D all die in the lifetime of A*. Does *E* become a coparcener with *A*? The answer is, no; for *E* is *fifth* in descent from *A*. The result is that *A* becomes the sole coparcener, and on his death the coparcenary property will pass by *succession* to his *heirs* according to the order given in sec. 43. If *A* has left nearer heirs than *E*, the property will pass to them. If *E* is the nearest heir of *A* living at the time of *A*'s death, the coparcenary property held by *A* will go to him as his *heir*. The law is that property held by a sole surviving coparcener passes on his death by *succession* to his heirs.

A
B
C
D
E

(d) *A* inherits certain property from his father *X*. *A* has a son *B*, a grandson *C*, two great-grandsons *D* and *D*1, and a great-great-grandson *E* by *D*1, all members of a joint family. Here *A*, *B*, *C*, *D* and *D*1 are coparceners, *E* is not, being more than four degrees removed from *A*. Suppose *B* dies first. The coparcenary will now consist of *A*, *C*, *D* and *D*1. The death of *B* does not introduce *E* into the coparcenary, for *A* being still alive, his great-great-grandson cannot be a coparcener with him. Suppose *C* dies next. The coparcenary will now consist of *A*, *D* and *D*1. The death of *C* does not introduce *E* into the coparcenary, for *A* being still alive, his great-great-grandson cannot be a coparcener with him. Suppose *D*1 dies next. The coparcenary will now consist of *A* and *D*. The death of *D*1 does not introduce *E* into the coparcenary, for *A* being still alive, his great-great-grandson cannot be a coparcener with him. Suppose *A* dies next, *D* now becomes the sole surviving coparcener, and the joint family property will pass



(*m*) *Moro Vishwanath* v. *Ganesh* (1873) 10 Bom. H. C. 444.

Ss. 215, 216

to D by survivorship. *The death of A does not introduce E into the coparcenary.* The reason is that at the time of A's death, E's father ($D1$), his grandfather (C) and his great-grandfather (B), were all dead.

Before leaving this subject, we may cite the following passage from Mayne's "Hindu Law and Usage" (9th ed., s. 271), which deals with coparceners:—

"The question in each case will be, who are the persons who have taken an interest in the property *by birth.* The answer will be, that they are the persons who offer the funeral cakes to the owner of the property, that is to say, the three generations next to the owner in unbroken male descent. Therefore, if a man has living sons, grandsons and great-grandsons, all of these constitute a single coparcenary with himself. Everyone of these descendant is entitled to offer the funeral cake to him, and therefore everyone of them obtains by birth an interest in his property. But the son of one of the great-grandsons would not offer the cake to him, and therefore is out of the coparcenary, *so long as the common ancestor is alive.* But while fresh links are continually being added to the chain of descendants by birth, so earlier links are being constantly removed from the upper end of the chain by death. So long as the principle of survivorship continues to operate, the right to the property will devolve from those who are higher in the line to those who are lower down. As each fresh member takes a share, his descendants to the third generation below him take an interest in that share by birth. So the coparcenary may go on widening and extending, until its members may include persons who are removed by indefinite distances from the common ancestor. But this is *always subject to the condition* that no person who claims to take a share is more than three steps removed from a direct ascendant who has taken a share. Whenever a break of more than three degrees occurs between any holder of property and the person who claims to take next after that holder, the line ceases in that direction, and the survivorship is confined to those collaterals and descendants who are within the limit of three degrees."

216. Undivided coparcenary interest.—The essence of a coparcenary under the Mitakshara law is *unity of ownership.* The ownership of the coparcenary property is in the whole body of coparceners. According to the true notion of an undivided family governed by the Mitakshara law, no individual member of that family, whilst it remains undivided, can predicate, of the joint and undivided property, that he, that particular member, has a definite share, one-third or one-fourth (*n*). His interest is a fluctuating interest, capable of being enlarged by deaths in the family, and liable to be diminished by births in the family (*o*). It is only *on a partition* that he becomes entitled to a definite share. The most appropriate term to describe the interest of a coparcener in coparcenary property is "undivided coparcenary interest." The nature and extent of that interest is defined in sec. 235. For the present it is enough to say that the rights of each coparcener until a partition takes place consist in a *common possession and common enjoyment* of the coparcenary property. As observed by the Privy Council in *Katama*

(*n*) *Appovier* v. *Rama Subba* (1866) 11 M. I. A. 75, 89.

(*o*) *Sudarsanam* v. *Narasimhulu* (1902) 25 Mad. 149, 154, 156.

Natchiar v. *The Rajah of Shivagunga* (*p*), "there is *community of interest and unity of possession* between all the members of the family, and upon the death of any one of them the others may well *take by survivorship* that in which they had during the deceased's lifetime a common interests and a common possession." Ss. 216, 217

Illustration.

Suppose a family to consist of *A* and his sons *B* and *C*; on a partition each will take one-third. But if *D* was born while the family remained joint, each would take one-fourth. Suppose the family still to remain undivided; on the death of *A*, the possible shares of the three sons would be enlarged to one-third; and if *B* were subsequently to die without issue, the shares of *C* and *D* would be enlarged to one-half. As *C* and *D* married, their sons *E*, *F* and *G* would enter into the family, and acquire an interest in the property, but that interest again would be a shifting interest, depending on the state of the family. If *C* were to die leaving only two sons *E* and *F* and they claimed a partition against *D*, *E* and *F* would each take one-half of one-half, and *D* would take the other half. But if *H* had previously been born, *E*, *F* and *H* would each take one-third of one-half, that is, one-sixth each. If they put off their claim for a division till *D* and *G* had both died, *E*, *F* and *H* would each take one-third of the whole (*q*).

A
B C D
E F H G

Note that on a partition between *C* and *D* after the death of *A* and *B*, *C* would take one-half and *D* would take the other half. If *C* is dead, his issue *E*, *F* and *H* will take *per stirpes* as regards *D*, that is, they will take the one-half share of *C*, and *D* will take the other half, but as regards each other they will take *per capita*, that is, each will take an equal one-sixth share.

The interest of a coparcener in an undivided Mitakshara family is *not individual* property (*r*). But the interest of a coparcener in an undivided Dayabhaga family is individual property (*s*). See sec. 279.

217. Females cannot be coparceners.—No female can be a coparcener under the Mitakshara law. Even a wife, though she is entitled to maintenance out of her husband's property and has to that extent an interest in his property, is not her husband's coparcener (*t*). This is the law even according to the Mithila School (*u*). Nor is a mother a coparcener with her sons (*v*) nor a mother-in-law with her daughter-in-law (*w*). There can be no coparcenary between a mother and daughter among devadasees (*x*). Nor can a widow succeeding under the Hindu Women's Rights to Property Act to her husband's share in a joint family be a coparcener (x_1).

(*p*) (1863) 9 M.I.A. 543, 611.

(*q*) Mayne's "Hindu Law," 10th ed., 265A.

(*r*) *Gharib Ullah* v. *Khalak Singh* (1903) 25 All. 407, 30 I.A. 165.

(*s*) *Sreemutty Soorjeemony Dosse* v. *Denobundoo* (1865) 6 M.I.A. 526, 553.

(*t*) *Punna Bibee* v. *Radha Kissen Das* (1904) 31 Cal. 476.

(*u*) *Srimathi Sabitri* v. *Mrs. F. A. Savi* (1934) 13 Pat. 359, 145 I.C. 1, ('33) A.P. 306.

(*v*) *Hira Singh* v. *Mst. Manglan* (1928) 9 Lah. 324, 330, 106 I.C. 877, ('28) A.L. 122; *Sital Prasad* v. *Sri Ram* (1941) Luck. 450.

(*w*) *The Commissioner of Income Tax* v. *Pannabai* (1943) Nag. 458, ('43) A.N. 160.

(*x*) *Gangamma* v. *Kuppammal* (1938) Mad. 789, ('39) A. M. 139.

(x_1) *Seethabai* v. *Narasimha* (1945) Mad. 568.

II.—COPARCENARY PROPERTY.

S. 218

218. Obstructed and unobstructed heritage.—(*1*) The Mitakshara divides property into two classes, namely, *apratibandha daya* or unobstructed heritage, and *sapratibandha daya* or obstructed heritage. Property in which a person acquires an interest *by birth* is called unobstructed heritage. It is called unobstructed, because the accrual of the right to it is not obstructed by the existence of the owner. Thus property inherited by a Hindu from his father, father's father, or father's father's father, but not from his maternal grandfather (*y*), is unobstructed heritage as regards his own male issue, that is, his son, grandson, and great-grandson (*z*). His male issue acquire an interest in it from the moment of their birth. Their right to it arises from the mere fact of their birth in the family, and they become coparceners with their paternal ancestor in such property immediately on their birth. *Ancestral* property is unobstructed heritage.

A inherits property from his father. A son is afterwards born to him. The son becomes a coparcener with his father *A by birth*, and is entitled to an equal undivided half share in the property. The property in the hands of *A* is *unobstructed* heritage, for the existence of *A* is no obstruction or impediment or bar to the son acquiring an interest in the property. But if *A* has no male issue, but a separated brother only, the property in the hands of *A* is *obstructed* heritage, for the brother can acquire no interest in it until *A*'s death. The existence of *A* is an obstruction to the brother acquiring any interest in the property during *A*'s lifetime. This is dealt with in the next paragraph.

Property, the right to which accrues *not by birth* but on the death of the last owner without leaving male issue, is called obstructed heritage. It is called obstructed, because the accrual of the right to it is obstructed by the existence of the owner. Thus property which devolves on parents, brothers, nephews, uncles, etc., upon the death of the last owner, is obstructed heritage. These relations do not take a vested interest in the property by birth. Their right to it arises for the first time on the death of the owner. Until then they have a mere *spes successionis* or a bare chance of succession to the property, contingent upon their surviving the owner (*a*).

(*2*) Unobstructed heritage devolves by survivorship; obstructed heritage, by succession. There are, however, four cases in which obstructed heritage also passes by survivorship, being those mentioned in sec. 31 above (*b*).

(*y*) *Muhammad Hussain* v. *Babu Kishwanandan Sahai* (1937) 64 I.A. 250, (1937) All. 65, 39 Bom. L.R. 979, 169 I.C. 1, ('37) A.PC .233.

(*z*) *Mst. Sirthaji* v. *Alagu Upadhia* (1937) 12 Luck. 273, 163 I.C. 935, ('36) A. O. 331.

(*a*) Mitakshara, Ch. I, s. 1, v. 3.

(*b*) *Raja Venkayyamma* v. *Venkataramanayyamma* (1902) 25 Mad. 678, 687, 29 I.A. 156, 165.

Note that the only persons who take an interest *by birth* are the son, grandson and great-grandson. The property in which they acquire an interest by birth is *ancestral* property, that is, property inherited by their father, paternal grandfather, or great-grandfather, from their father, paternal grandfather, or great-grandfather. A son, grandson, or great-grandson, does not acquire an interest by birth in the separate or self-acquired property of the father, grandfather or great-grandfather. **Ss. 218-220**

Note that a son, grandson, and great-grandson acquire an interest by birth not only in ancestral property (which is only a species of coparcenary property), but in all kinds of coparcenary property; see sec. 220.

Illustrations.

(a) *A* inherits certain property from his father. *A* has a son *B*. The property so inherited is unobstructed as regards *B*. That is to say, *B* becomes a coparcener *from his very birth* in the property with his father *A*, and on *A*'s death the property will pass to him by *survivorship*. The result would be the same if *A* had inherited the property from his paternal grandfather or great-grandfather.

(b) In the case put above, *A* has a grandson *C*, but no son. *C*'s rights are the same as those of *B*.

(c) *A* inherits certain property from his *brother*. *A* has a son *B*. The property is *obstructed* in *A*'s hands. *B* does not take any interest in it *during A's life*. After *A*'s death, *B* will take it as *A*'s heir by succession. The existence of *A* is an obstruction to the accrual of any rights in the property to *B*.

219. Unobstructed heritage not recognized by the Dayabhaga.—The distinction between obstructed and unobstructed heritage is peculiar only to the Mitakshara School. According to the Dayabhaga, all heritage is obstructed, for, according to the doctrines of that school, no person, not even a son, takes an interest by birth in the property of another. The Dayabhaga does not recognize the principle of survivorship. It recognizes only the right of succession and this right accrues for the first time on the death of the last owner. The Privy Council, however, has applied the doctrine of survivorship to property jointly inherited by two or more widows and two or more daughters even in cases arising under the Dayabhaga law [s. 31].

220. Classification of property.—Property, according to the Hindu law, may be divided into two classes, namely, (1) joint family property, and (2) separate property.

Joint family property may be divided, according to the source from which it comes, into—

(1) ancestral property [ss. 223-225]; and

(2) separate property of coparceners thrown into the common coparcenary stock [s. 227.]

Property jointly acquired by the members of a joint family *with* the aid of ancestral property is joint family property.

Ss. 220, 221 Property jointly acquired by the members of a joint family *without* the aid of ancestral property may or may not be joint family property; whether it is so or not is a question of fact in each case [s. 228].

The term "joint family property" is synonymous with "coparcenary property."

"Separate" property includes "self-acquired" property [ss. 222, 231].

221. Incidents of joint family or coparcenary property.—(*1*) Joint family or coparcenary property is that in which every coparcener has a joint interest and a joint possession (*c*). The following are the main incidents of joint family or coparcenary property:—

(a) it devolves by survivorship, not by succession [s. 229];

(b) it is property in which the male issue of the coparceners acquire an interest by *birth*.

(*2*) The *joint family property* must be distinguished from the *joint property* of the English law. The joint property of the English law devolves like joint family property by survivorship. But the male issue of the joint tenants do not acquire any interest in it by birth.

Two complete strangers may be joint tenants according to English law, but in no conceivable circumstance could they constitute a joint Hindu family, or hold property as a joint Hindu family. The fundamental principle of a joint Hindu family is the tie of sapindaship, without which it is impossible to form a joint Hindu family (*d*).

Joint family property is to be distinguished from what is known as *joint property* in English law. The joint property of the English law, like joint family property, devolves by survivorship and is liable to partition, but the male issue of those who own joint property do not acquire an interest in it by birth as do the male issue of those who own joint family property. Those who own joint property, as conceived, in English law, are called joint tenants. Joint family property is purely a creature of Hindu law, and those who own it are called coparceners. The rights of coparceners are set forth in s. 235 below. The distinction between joint family property and joint property comes into prominence only in two kinds of cases, namely, the case dealt with in s. 223, sub-sec. (*2*) [property inherited from maternal grandfather], and that dealt with in s. 228 [joint acquisitions]. After leaving s. 228 we shall use the expression "joint property" as equivalent to "joint family property."

(c) *Katama Natchiar* v. *The Raja of Shivagunga* (1863) 9 M.I.A. 543, 611.

(d) *Karsandas* v. *Gangabai* (1908) 10 Bom. L.R. 184.

222. Incidents of separate or self-acquired property.— A Hindu, even if he be joint, may possess separate property. Such property belongs exclusively to him. No other member of the coparcenary, not even his male issue, acquires any interest in it by birth. He may sell it (*e*), or he may make a gift of it, or bequeath it by will, to any person he likes (*f*). It is not liable to partition (*g*), and, on his death intestate, it passes by succession to his heirs, and not by survivorship to the surviving coparceners (*h*). **Ss. 222, 223**

Explanation.—The expression "male issue" in this and subsequent sections means and includes sons, sons' sons, and sons' sons' sons.

"According to the principles of Hindu law, there is coparcenaryship between the different members of a united family, and survivorship following upon it. There is community of interest and unity of possession between all the members of the family, and upon the death of any one of them the others may well take by survivorship that in which they had during the deceased's lifetime a common interest and common possession. But the law of partition shows that as to the *separately self-acquired property* of one member of a united family, the other members of that family have neither community of interest nor unity of possession. The foundation, therefore, of a right to take *such* property by survivorship fails" (*i*). Such property passes by *succession* to the heirs of the deceased, and not to the surviving coparceners.

The normal condition of property according to the Mitakshara law is that it is "joint" as distinguished from "separate." Property according to that law cannot long remain separate. Thus if *A* holds separate or self-acquired property, on his death it becomes joint family property in the hands of his male issue. If he has left no male issue, but a widow, it will pass to his widow. On the widow's death, however, it will pass to *A*'s collateral heirs. Thus if *A* has left a brother, it will go to the brother. The brother will take it as his *separate* property, but if he has sons, it will on his death pass to his sons, and in their hands it will be joint family property as regards their male issue (*j*).

It is now settled that a son does not take any interest by birth in the separate or self-acquired property of his father even though such property may be *immoveable*. The father may sell such property without the concurrence of the sons (*k*). He may make an unequal distribution of such property among his sons (*l*), and he may make a gift of it to one son to the entire exclusion of the other sons (*m*).

223. Ancestral property.—(*1*) *Property inherited from paternal ancestor.*—All property inherited by a male Hindu

(*e*) *Muddun Gopal* v. *Ram Buksh* (1863) 6 W.R. 71.

(*f*) *Rao Balwant Singh* v. *Rani Kishori* (1898) 20 All. 267, 25 I.A. 54 (gift); *Nagalingan* v. *Ramachandra* (1901) 24 Mad. 429; *Subbayya* v. *Surayya* (1887) 10 Mad. 251; *Somasundara* v. *Ganga* (1905) 28 Mad. 386; *Bawa Misser* v. *Raja Bishen* (1868) 10 W.R. 287, s.c. in app. 20 W.R. 137; *Sital* v. *Madho* (1877) 1 All. 394; *Baboo Beer Partab* v. *Rajender* (1867) 12 M.I.A. 1, 39; *Nana Narain* v. *Huree Punth* (1862) 9 M.I.A. 96; *Purshottam* v. *Vasudev* (1871) 8 Bom. H.C.O.C. 196.

(*g*) *Lochun Singh* v. *Nemdharee Singh* (1873) 20 W.R. 170; *Yamnanbai* v. *Manubai* (1899) 23 Bom 543, 611.

(*h*) *Katama Nachiar* v *Rajah of Shivagunga* (1863) 9 M.I.A. 543, 613.

(*i*) (1863) 9 M I A 543, 611, *supra*.

(*j*) *Rajah Ram* v. *Pertum Singh* (1873) 11 Beng. L.R. 397, 403-404.

(*k*) *Muddun Gopal* v. *Ram Buksh* (1863) 6 W.R. 71.

(*l*) *Bawa Misser* v. *Rajah Bishen*, *supra*.

(*m*) *Sital* v. *Madho* (1877) 1 All. 394.

S. 223 (1) from his father, father's father, or father's father's father, is *ancestral* property. The essential feature of *ancestral* property according to the Mitakshara law is that the sons, grandsons and great-grandsons of the person who inherits it, acquire an interest in it *by birth*. Their rights attach to it *at the moment of their birth*. Thus if *A* inherits property, whether moveable or immoveable, from his father or father's father, or father's father's father, it is ancestral property *as regards his male issue* (*n*). If *A* has no son, son's son, or son's son's son in existence at the time when he inherits the property, he holds the property as absolute owner thereof, and he can deal with it as he pleases. But if he has sons, sons' sons, or sons' sons' sons in existence at the time, or if a son, son's son or son's son's son is born to him subsequently, they become entitled to an interest in it by the mere fact of their birth in the family, and *A* cannot claim to hold the property as absolute owner, nor can he deal with the property as he likes (*o*). It is very important to note that the only property that can be *ancestral* is property inherited by a male Hindu from any one of his three immediate paternal ancestors, namely, his father, father's father, and father's father's father, and the only persons who are entitled to an interest in it by birth are the sons, sons' sons, and sons' sons' sons, of the inheritor. No other relation is entitled to any interest in such property *by birth*. A person inheriting property from his three immediate paternal ancestors holds it, and must hold it, in coparcenary with his sons, sons' sons, and sons' sons' sons, but as regards other relations he holds it, and is entitled to hold it, as his absolute property. The result is that if a person inheriting property from any one of his three immediate paternal ancestors has no son, son's son, or son's son's son, the property is his absolute property, and no relations of his are entitled to any interest in it in his lifetime (*p*).

Property inherited by a Hindu male from his father, father's father, or father's father's father, is ancestral as regards his male issue, even though it was inherited by him after the death of a life-tenant (*q*). Thus if a Hindu settles the income of his property on his wife for her life, and the property after her death passes to his son as his heir, it is ancestral property in the hands of the son as regards the male issue of such son.

(*n*) *Mst. Sirthaji* v. *Alagu Upadia* (1937) 12 Luck. 273, 163 I.C. 935, ('36) A.O. 331.

(*o*) *Jugmohandas* v. *Mangaldas* (1886) 10 Bom. 528 ; *Raja Ram Narayan* v. *Pertum Singh* (1873) 11 Beng. L.R. 397 ; *Chuttan Lal* v. *Kallu* (1911) 33 All. 283, 8 I.C. 719 [alienation before birth.]

(*p*) *Ajoodhia* v. *Kasee* (1872) 4 N. W. P. 31 ; *Janki* v. *Nand Ram* (1889) 11 All. 194-197, 198 [F.B.]. See *Bejai Bahadur* v. *Bhupindar* (1895) 17 All. 456, 22 I.A. 139.

(*q*) *Nanabhai* v. *Achratbai* (1888) 12 Bom. 122, 133 ; *Beni Pershad* v. *Puran* (1896) 23 Cal. 262, 273.

Illustrations. **S. 223 (2)**

(a) *A* inherits certain property from his father. *A* has a son *B*. The property so inherited is ancestral in *A*'s hands, and it must be held by him in coparcenary with *B*. *B* can enforce partition of it against *A*, in which event he will be entitled to one-half. If *B* continues joint with his father, the whole property will pass to him by survivorship on the father's death.

(b) *A* inherits two immoveable properties from his father. *A* has no son, son's son, or son's son's son in existence at the time. *A* can alienate the properties at his pleasure. Suppose *A* alienates one of the properties, and a son, *B*, is subsequently born to him. *B* cannot claim any interest in the property alienated by *A* before his birth, but as regards the other property which still remains with *A*, *B* acquires an interest in it by birth, and *A* must thenceforth hold it in coparcenary with *B*.

(c) *A* inherits certain property from his father. *A* has no son, grandson or great-grandson, but he has a brother (or a paternal uncle). The brother (or uncle) does not take any interest in the property by birth. As regards the brother or uncle the property inherited by *A* is his separate property. *A* may therefore sell or mortgage (*r*) it, or make a gift of it to any one he likes, or he may dispose of it by will.

Where a number of sons inherit their father's self-acquired property, they hold it as joint family property (*s*).

(2) *Property inherited from maternal grandfather.*—In *Venkayyamma* v. *Venkataramanayyamma* (*t*), two brothers *who were living as members of a joint family* inherited certain property from their maternal grandfather. On the death of one of them leaving a widow, the question arose whether his share in the property so inherited passed to his widow by succession or to his brother by survivorship. Their Lordships of the Privy Council held that the property inherited by the two brothers was *joint property* in their hands, and that the undivided interest of the deceased passed on his death by survivorship to his brother, and not by succession to his widow. The effect of this decision is that the sons of a daughter inheriting to their maternal grandfather take as joint-tenants with benefit of survivorship and not as tenants-in-common. The Privy Council have now held that such property is not ancestral property (*u*). The Privy Council explained their former decision thus: " The brothers took the estate of their maternal grandfather at the same time and by the same title and there was apparently no reason why they should not hold that estate in the same manner as they held other

(*r*) *Baijnath* v. *Maharaj Bahadur* (1933) 8 Luck. 28, 137 I.C. 814, ('32) A.O. 158.

(*s*) *Shyam Behari Singh* v. *Rameshwar Prasad Sahu* (1941) 20 Pat. 904, 198 I.C. 208, ('42) A.P. 213.

(*t*) (1902) 25 Mad. 678, 29 I.A. 156.

(*u*) *Muhammad Hussain Khan* v. *Babu Kishwanandan Sahai* (1937) 64 I.A. 250, (1937) All. 65, 39 Bom. L.R. 979, 169 I.C. 1, ('37) A.P.C. 233. The decision in *Vythinatha Ayyar* v. *Yeggia Narayana* (1903) 27 Mad. 382 must be regarded as over-ruled, and those in *Jumna Prasad* v. *Ram Partab* (1907) 29 All. 667, and *Biswanath* v. *Gajadhar* (1918) 3 Pat. L.J. 168, 43 I.C. 370, ('17) A.P. 146 must be regarded as approved.

S. 223 (3), (4)

joint property. The rule of survivorship which admittedly governed their other property was held to apply also to the estate which had come to them from their maternal grandfather" (v). Their Lordships pointed out further that "it was not contended in that case that the estate was ancestral in the restricted sense in which the term is used in Hindu Law." It is submitted that the decision in the earlier case must be confined to its own facts, and it was not necessary there to decide, nor was any opinion expressed on the precise question whether the property which a Hindu inherits from his maternal grandfather is ancestral property in the technical sense. Should this question arise hereafter it will have to be answered in accordance with the decision in the later case (w). A maternal *uncle*, however, is *not an ancestor*, and it has accordingly been held by the Madras High Court that property inherited from a maternal uncle is not ancestral property (x).

No such question can arise if the daughter takes an *absolute* estate as in Bombay, for her sons would then succeed to that property not as the heirs of their maternal grandfather, but as the stridhana heirs of their mother (y). See sec. 147 (2) and sec. 151 (II).

(3) *Property inherited from collaterals—property inherited from females.*—Excluding the doubtful case of property inherited from a maternal grandfather, it may be said that the only property that can be called ancestral property is property inherited by a person from his father, father's father, or father's father's father. Property inherited by a person from any other relation is his separate property, and his male issue do not take any interest in it by birth. Thus property inherited by a person from collaterals, such as a brother, uncle, etc., or property inherited by him from a female, *e.g.*, his mother, is his separate property (z).

(4) *Share allotted on partition.*—The share which a coparcener obtains on partition of ancestral property is ancestral property *as regards his male issue*. They take an interest in it by birth (a), whether they are in existence at the

(v) The father of the two brothers was living when they inherited their maternal grandfather's estate and the 'other property' was being enjoyed by three persons.

(w) *Pandit Mohanlal* v. *Pandit Ramdayal* (1941) 16 Luck. 708, 194 I.C. 61, ('41) A.O. 331.

(x) *Karuppai* v. *Sankaranarayanan* (1904) 27 Mad. 300.

(y) *Manibhai* v. *Shankerlal* (1930) 54 Bom. 323, 125 I.C. 433, ('30) A.B. 296.

(z) *Baboo Nund Coomar* v. *Razeeooddeen* (1873) 10 Beng. L.R. 183; *Raj Kishore* v. *Madan Gopal* (1932) 13 Lah. 491, 143 I.C. 249, ('32) A.L. 636.

(a) *Lal Bahadur* v. *Kanhaiya Lal* (1907) 29 All. 244, 34 I.A. 65; *Chatturbhooj* v. *Dharamsi* (1885) 9 Bom. 438; *Lakshmibai* v. *Ganpat* (1868) 5 Bom. H.C.O.C.J. 128.

time of partition or are born subsequently (*b*). Such share, however, is ancestral property only as regards his male issue. *As regards other relations*, it is separate property, and if the coparcener dies without leaving male issue, it passes to his heirs by succession (*c*). **S. 223 (5)**

Illustrations.

A and *B*, two Hindu brothers, are members of a joint family. *A* has a son *C*. *B* has no son, but a wife. *A* and *B* divide the joint family property. *A*'s share of the property is his separate property as regards *B*, but it is ancestral as regards his son *C*. The share of *B* also is his separate property as regards *A*, and on *B*'s death without leaving male issue, it will pass to his wife, as his heir. The effect of the partition is to cut-off the claims of the dividing members, but the father and his male issue still remain joint.

When the share allotted to a coparcener on partition consists of property which is subject to a mortgage, the fact that he subsequently clears it from the mortgage by his own self-acquisitions, does not alter the character of the property. The unencumbered property still remains ancestral, and his male issue acquire an interest in it by birth (*d*). It is otherwise where the mortgage has been *foreclosed*, and the mortgaged property is subsequently purchased by the coparcener with his own self-acquisitions (*e*).

(5) *Property obtained by gift or will from paternal ancestor.*—Where a Hindu, instead of allowing his self-acquired or separate property to go by descent, makes a gift of it to his son, or bequeaths it to him by will, the question arises whether such property is the separate property of the son, or whether it is ancestral in the hands of the son as regards his (son's) male issue. In Calcutta (*f*), it has been held that such property would be ancestral. In Madras (*g*), upon the whole, the view seems to have been taken that the father can determine whether the property which he has so given shall be ancestral or self-acquired on the principle of "*cuius est dare eius est disponere*," but that unless he expresses his wish that it should be deemed self-acquired, it is ancestral. In Bombay (*h*), on the other hand, the principle of intention seems to have been accepted if it makes the property ancestral, but if there be no expression of intention, it is deemed self-acquired. In Allahabad (*i*), the decision is that such property is self-acquired. In Oudh (*j*), it has been held that in the absence of language clearly indicating the testator's intention that the

(*b*) *Adurmoni* v. *Chowdhry* (1878) 3 Cal. 1, 8, where the son was born after partition.

(*c*) See *Bejai Bahadur* v. *Bhupindar* (1895) 17 All. 456, 22 I.A. 139.

(*d*) *Visalatchi* v. *Annasamy* (1871) 5 Mad. H.C. 150.

(*e*) *Balwant Singh* v. *Rani Kishori* (1898) 20 All. 267, 25 I.A. 54.

(*f*) *Mudden Gopal* v. *Ram Buksh* (1863) 6 W.R. 71 [gift]; *Hazari Mall* v. *Abaninath* (1912) 17 C.W.N. 280, 18 I.C. 625.

(*g*) *Tara Chand* v. *Reeb Ram* (1866) 3 Mad. H.C. 50 [will]; *Nagalingam* v. *Ramchandra* (1901) 24 Mad. 429 [will]; *Velayudhan* v. *Commissioner of Income Tax, Madras* (1945) Mad. 599.

(*h*) *Jugmohandas* v. *Mangaldas* (1886) 10 Bom. 528, 579 [will]; *Nanabhai* v. *Achratbai* (1888) 12 Bom. 122.

(*i*) *Parsotam* v. *Janki Bai* (1907) 29 All. 354 [will].

(*j*) *Rameshar* v. *Rukmin* (1909) 14 Oudh Cases 244, 12 I.C. 770; *Musammat Brij Kunwar* v. *Rai Bahadur Pandit Sankata Prasad* (1929) 4 Luck. 400, 123 I.C. 849, ('30) A.O. 39.

S. 223 (5) property should be held by the sons subject to the incident of survivorship, it should be presumed that such property is self-acquired. The question was left open by the Judicial Committee in the under-mentioned case (*k*). In one case in Patna where the donor stated that though the son may be malik after his death he wished to make the son malik in his presence, it was held by a Full Bench that the donee gets the property as ancestral property (*l*).

Illustrations.

(a) *A* and his five sons constitute a joint Mitakshara family. *A* executes a deed of gift of his self-acquired immoveable property by which he gives portions to each of his five sons. According to the Calcutta High Court, the property so acquired by each son is *ancestral* in his hands, and his male issue acquire an interest in it by birth. There is no question of intention according to that Court: *Muddun Gopal* v. *Ram Buksh* (1863) 6 W.R. 71.

(b) *A*, by his will, bequeathed the residue of his property to his three sons in the following terms: "My three sons aforesaid who are now alive, together with all the sons who may be born to me hereafter, shall divide all my properties into as many equal shares [as there be sons], and each son should take one share." The will contained a direction that the family house should not be divided between the sons until after the death of *A*'s wives. *Held* by the High Court of Madras, that *there were no express words in the will indicating an intention* that the share bequeathed to each son should be held by him *as his self-acquired property*; therefore, the share bequeathed to each son was ancestral property in his hands, and the male issue of each son acquired an interest in it by birth: *Nagalingam* v. *Ramchandra* (1901) 24 Mad. 429.

(c) *A*, by his will, bequeathed the residue of his property to his son in the following terms: "After my death my son Mangaldas is the master [owner] of my estate. He is not to dispose of the estate, nor is he to give it in mortgage, but from the produce of rent thereof all the charges of the estate and of the family are to be disbursed, and the balance placed at interest at some proper place, but it is to belong to my son Mangaldas. Should he be under the necessity of giving the estate away by way of mortgage or selling them, he may do so on consulting the herein mentioned executors." *Held* by the High Court of Bombay, that *there were no words in the will indicating an intention* that the property should be held by him *as ancestral property*; therefore, the son took the property as his self-acquired property, and his male issue did not acquire any interest in it by birth: *Jugmohandas* v. *Mangaldas* (1886) 10 Bom. 528.

The summary of the law given in sub-sec. (*5*) is taken almost verbatim from the judgment of the Judicial Committee in *Lal Ram Singh* v. *Deputy Commissioner of Partabgarh* (*m*). Their Lordships did not decide between the conflicting decisions of the High Courts, but said that when the time came, they would prefer to go back to the original text of the Mitakshara and put their own construction upon that text.

The text of the Mitakshara referred to above is as follows:—"Whatever else is acquired by the coparcener himself without detriment to his father's estate, or as a present from a friend, or a gift at nuptials, does not appertain to the co-heirs": Mitakshara Chapter I, sec. 4, para 1.

(*k*) *Lal Ram Singh* v. *Deputy Commissioner of Partabgarh* (1923) 50 I.A. 265, 45 All. 596, 76 I.C. 922, ('23) A.PC. 160.

(*l*) *Bhagwat Shukul* v. *M. T. Kaporni* (1944) 23 Pat. 599.

(*m*) (1923) 50 I.A. 265, 275, 45 All. 596, 604, 76 I.C. 922, ('23) A.PC. 160.

The words "does not appertain to the co-heirs" mean "does not belong to the coparceners." In *Muddan Gopal* v. *Ram Buksh* (n), the Calcutta High Court held that the property given by a father to his sons cannot be said to have been acquired by them "without detriment" to their father's estate within the meaning of the above text, because it is not only given out of that estate, but in substitution for the undivided share of that estate; that the son is only getting by his father's gift that which, but for the gift, he would have received by descent; had he received it by descent, it would have been ancestral property in his hands; the character of the property is not changed because he receives it by way of gift.

A gift of property made by a father to his son *on the occasion of the son's marriage* is not ancestral property in the hands of the son. It comes within the words "gift at nuptials" in the above text, and it is his separate property (o).

(6) *Accretions.*—Accumulations of income of ancestral property (p), property purchased or acquired out of the income or with assistance of ancestral property (q), the proceeds of sale of ancestral property, and property purchased out of such proceeds (r), are ancestral property. It is now well established that sons, grandsons and great-grandsons acquire a vested interest not only in the income and accretions of ancestral property which accrued after their birth, but also in the income and accretions which accrued prior to their birth (s).

224. Character of father's and son's interest in ancestral property.—Under the Mitakshara law each son upon his birth takes an interest equal to that of his father in ancestral property, whether it be moveable or immoveable. It is very important to note that the right which the son takes at his birth in the ancestral property is *wholly independent of his father*. He does not claim through the father, and, therefore, a transfer by a father of his own interest in the ancestral property, where such transfer is allowed by law [s. 257], cannot affect the interest of the son in the property (t). But the father has a *special* power of disposal of *ancestral* property for certain purposes specified in sections 225, 226 and 295.

Authority of father.—There is under the Mitakshara law no distinction between the rights of a father and his sons as regards *ancestral* property, except that the father can dispose of (1) ancestral property, whether moveable or immoveable, for the payment of his debts, (2) ancestral *moveable* property for the purposes specified in s. 225, and (3) ancestral *immoveable* property for the purposes specified in s. 226. Further, the father so long as he is capable is the head and manager of the family. He is entitled to the

(n) (1863) 6 W.R. 71, 73.

(o) (1863) 6 W.R. 71, 73, *supra*. See also *Adhar Chandra* v. *Nobin Chandra* (1907) 12 C. W. N. 103.

(p) *Ramanna* v. *Venkata* (1888) 11 Mad. 246.

(q) *Lal Bahadur* v. *Kanhaia Lal* (1907) 29 All. 244, 34 I.A. 65; *Umrithnath* v. *Gouree-nath* (1870) 13 M.I.A. 542.

(r) *Krishnasami* v. *Rajagopala* (1895) 18 Mad. 73, 83.

(s) *Isree Pershad* v. *Nasib Kooer* (1884) 10 Cal. 1017, 1021; *Jugmohandas* v. *Mangaldas* (1886) 10 Bom. 528, 581; *Ramanna* v. *Venkata* (1888) 11 Mad. 246.

(t) *Anandrao* v. *Vasantrao* (1907) 9 Bom. L. R. 595, at p. 597 [P.C.], affirming (1904) 6 Bom. L.R. 925.

Ss. 224-226

possession of the joint property. He directs the concerns of the family within itself and represents it to the world. But as regards substantial *proprietorship*, he has no greater interest in the joint property than any of his sons. If the property is ancestral, each son by birth acquires an interest equal to that of the father. ' And in the same manner his grandsons and great-grandsons take an interest on their respective births in the rights of their fathers who represent them, and therefore in unascertained shares of the entire property.

225. Gift by father within reasonable limits of ancestral moveables. Although sons acquire by birth rights equal to those of a father in ancestral property both moveable and immoveable, the father has the power of making *within reasonable limits* gifts of ancestral moveable property without the consent of his sons for the purpose of performing "indispensable acts of duty, and for purposes prescribed by texts of law, as gifts through affection, support of the family, relief from distress and so forth" (*u*).

A "gift of affection" may be made to a wife, to a daughter, and even to a son. But the gift must be of property within reasonable limits. A gift of the whole, or almost the whole, of the ancestral moveable property to one son to the exclusion of the other sons, cannot be upheld as a "gift through affection" prescribed by the text of law (*v*).

In Madras it has been held that a disposition may be made of a small portion of the property in favour of a daughter or other female member *even by will*, provided the father obtains the consent of his sons to such disposition (*w*). But the correctness of this decision is open to question, for no member of a joint family, not even a father, can dispose of even his own coparcenary interest *by will* though the other coparceners may consent to the disposition [s. 256]. The soundness of the decision was questioned in the later Madras case of *Subbarami* v. *Ramamma* (*x*). In that case a father who was joint with his minor son bequeathed by his will certain family properties to his wife for her maintenance. There was no question of consent, the son being a minor. It was held that the will was invalid and inoperative as against the son, although it would have been a proper provision if made by the father by a *gift* during his lifetime (*x*).

226. Gift by father or other managing member of ancestral immoveable property within reasonable limits.—A Hindu father or other managing member has power to make a gift within

(*u*) Mitakshara, Chap. I, sec. 1, para. 27.

(*v*) *Lakshman* v. *Ramchandra* (1881) 5 Bom. 48, 7 I.A. 181, affirming (1876) 1 Bom. 561 [gift to son set aside]; *Nand Ram* v. *Mangal* (1909) 31 All. 359, 1 I.C. 797 [gift to son set aside]; *Bachoo* v. *Mankorebai* (1907) 31 Bom. 373, 34 I.A. 107, affirming (1905) 29 Bom. 51 [gift to daughter of Rs. 20,000 made out of income, *upheld*, the total value of the property being from Rs. 10 to 15 lacs]; *Ramalinga* v. *Narayana* (1922) 49 I.A. 168, 45 Mad. 489, 68 I.C. 451, ('22) A.PC. 201 [gift to only daughter who was looking after the father]; *Kamakshi* v. *Chakrapany* (1907) 30 Mad. 453 [gift to daughter set aside as it was of a *considerable* portion of the property]; *Hanmantapa* v. *Jivabai* (1900) 24 Bom. 547, 552, 555 [gift to daughter-in-law upheld]; *Madhusudan* v. *Ramji* (1920) 5 Pat. L. J. 516, 57 I.C. 341, ('20) A.P. 114 [provision before marriage for maintenance of son-in-law and, therefore, also of the daughter, upheld].

(*w*) *Appan Patra* v. *Srinivasa* (1917) 40 Mad. 1122, 40 I.C. 118, ('18) A.M. 531.

(*x*) *Subbarami* v. *Ramamma* (1920) 43 Mad. 824, 59 I.C. 681, ('20) A.M. 637.

reasonable limits of ancestral immoveable property for "pious purposes." But the alienation must be by an act *inter vivos*, and not by will (*y*). A member of a joint family cannot dispose of by will any portion of the property even for charitable purposes and even if the portion bears a small proportion to the entire estate (*z*).

"Even a single individual may conclude a donation, mortgage, or sale of immoveable property, during a season of distress, for the sake of the family, and *especially for pious purposes*": Mitakshara, ch. I, s. 1, v. 28-29. But he cannot dispose of it by will (*a*).

It has been held by the High Court of Madras that a father has no power to make a gift of ancestral *immoveable* property to his *wife* to the prejudice of his minor sons (*b*). But it has been held by the same Court that he can make a gift of a small portion of ancestral *immoveable* property to his *daughter* at or after her marriage, such gift being customary in that Presidency (*c*). In Bombay, it has been held that a father cannot make a gift of even a small portion of the joint family immoveable property to his daughter, though it be on the ground that she was looking after him in his old age (*d*). In an Allahabad case (*e*), the Court refused to uphold a gift by a father to his daughter's father-in-law of a share in a village, though it was transferred to him as the marriage portion of the daughter. A gift to a stranger is equally invalid and the other members of the family, while in possession, need not sue to set it aside (*f*).

227. Property thrown into common stock.—(*1*) Property which was originally the separate or self-acquired property of a member of a joint family may become joint family property, if it has been voluntarily thrown by him into the common stock with the intention of abandoning all separate claims upon it. A clear intention to waive his separate rights must be established (*g*), and it will not be inferred from the mere fact of his allowing the other members of the family to use it conjointly with himself nor from the fact that the income of the separate property was used to support a son (*h*) nor from the mere failure of a member to keep separate accounts

(*y*) *Gangi Raddi* v. *Tammi Raddi* (1927) 54 I.A. 136, 140, 50 Mad. 421, 425, 109 I.C 79, ('27) A.P.C. 80; *Gopal Chand* v. *Babu Kunwar* (1843) 5 S.D.A., p. 24; *Raghunath* v. *Gobind* (1886) 8 All. 76 [provision for family idol]; *Ramalinga* v. *Sivachidambara* (1919) 42 Mad. 440, 49 I.C. 742, ('19) A.M. 809 [gift to an idol of a temple on the occasion of the donor's father's funeral], doubting *Rathnam* v. *Sivasubramania* (1893) 16 Mad. 353 [gift of a silver vehicle to a temple]; *Sri Thakurji* v. *Nunda* (1921) 43 All. 560, 63 I.C. 546, ('21) A.A. 333 [gift to an idol]; *Kalu* v *Barsu* (1895) 19 Bom. 803 [gift to plaintiff as worshipper of a deity-gift not upheld]; *Amar Chandra* v. *Saradamayee* (1930) 57 Cal. 39, 123 I.C. 660, ('29) A.C. 787. See also West and Buhler, 4th edi , p. 204, note (l), and p. 686, note (g), and *Haridas* v. *Devkuvarbai* (1926) 5 Bom. 443, 449, 97 I.C. 820, ('26) A.B. 408 (gift to daughter upheld on the ground that the son had consented to it]

(*z*) *Jankharlal* v. *Shri Thakur Radha Gopalji Maharaj* (1945) All 177.

(*a*) *Lalta Prasad* v. *Sri Mahadeoji* (1920) 42 All. 461, 58 I.C. 667, ('20) A A. 116.

(*b*) *Ragakkal* v. *Subbanna* (1892) 16 Mad. 84

(*c*) *Sundararamayya* v. *Sitamma* (1912) 35 Mad. 628, 10 I.C. 56 [gift of 8 out of 200 acres upheld]

(*d*) *Jinnappa Mahadevappa* v *Chimmava Krishnappa* (1935) 59 Bom. 459, ('35) A.B. 324.

(*e*) *Ganga* v. *Pirthi Pal* (1880) 2 All. 635.

(*f*) *Riasat Ali* v. *Iqbal Rai* (1935) 16 Lah. 659, 157 I.C. 75, ('35) A.L. 827.

(*g*) *Raj Kishore* v. *Madan Gopal* (1932) 13 Lah 491, 143 I C. 249 ('32) A L. 636.

(*h*) *Gopal* v *Keshoba* (1936) Mad. 65, 165 I.C. 350, ('36) A.M. 185.

S. 227 of his earnings (*i*). Separate property thrown into the common stock is subject to all the incidents of joint family property (*j*).

(*2*) Similarly where members of a joint family, who have control over the joint estate, blend with that estate property in which they have separate interests, the effect is that all the property is so blended becomes joint family property (*k*).

(*3*) The above rules apply also to brothers living together and forming a joint family governed by the Dayabhaga (*l*).

Illustrations.

(a) Three Hindu brothers, *A*, *B* and *C*, lived together as members of a joint family in their ancestral house at Nagothna, the house being the only property left by the father. Subsequently *A* and *B* went to Baroda and got employment there as clerks. *C* remained at home to look after the family affairs. Both *A* and *B* remitted money from time to time to *C* for the support of the family living at Nagothna. *C* applied the income towards the support of the family, and with the savings from such remittances he purchased certain immoveable property in his own name. *A* and *B* sued *C* to recover possession of the property from *C*, alleging that it was their self-acquired property. *Held*, that the property was the self-acquired property of *A* and *B*, and they were entitled to it to the exclusion of *C*, unless it appeared that the property had been treated by *A* and *B* as joint family property. As there was no finding on the point, the High Court referred the following issue to the lower Court, namely, whether as a fact *A* and *B* had voluntarily thrown the property into the joint stock with the intention of abandoning all separate claims upon it: *Krishnaji* v. *Moro Mahadev* (1890) 15 Bom. 32.

(b) A joint Hindu family, consisting of a father and his three sons, owns certain villages which are the joint property of the family. The father as the head of the family opens an account with a banker with whom he deposits from time to time the income arising from the villages. The father also earns a large sum of money every year, and these earnings also are deposited by him with the banker in the *same* account. There is nothing to show that he discriminated between the income of the joint properties and his personal income. On the other hand the evidence shows that he blended them both in one general account. Upon these facts it was held by the Privy Council that the self-acquisitions of the father must be treated as joint family property, and that he had no power, therefore, to dispose of them by his will: *Lal Bahadur* v. *Kanhaiya Lal* (1906) 29 All. 244, 34 I.A. 65.

Separate property and limitation.—Where a coparcener discontinues his possession of property belonging to him separately in favour of the joint estate, his right to claim the property as separate may be barred by limitation (*m*).

(*i*) *Vythianatha* v. *Varadaraja* (1938) Mad. 696, ('38) A.M. 841.

(*j*) *Lal Bahadur* v. *Kahnaia Lal* (1907) 29 All. 244, 34 I.A. 65; *Suraj Narain* v *Ratan Lal* (1917) 44 I A. 201, 40 All. 159, 40 I.C. 988, ('17) A.PC. 12; *Radhakant Lal* v. *Nazma Begum* (1918) 45 Cal. 733, 45 I.C. 806, ('17) A.PC. 128 [property inherited from brother thrown into common stock]; *Lala Muddun Gopal* v. *Khikhinda Koer* (1891) 18 Cal. 341, 18 I.A. 9; *Krishnaji* v. *Moro Mahadev* (1891) 15 Bom. 32, 39-40; *Tribhovandas* v. *Yorke Smith* (1897) 21 Bom. 349; *Gopalasami* v. *Chinnsami* (1884) 7 Mad. 458 [property inherited from maternal grandfather thrown into common stock]; *Tottempudi* v. *Tottempudi* (1904) 27 Mad. 228; *Rampershad* v. *Sheo Churn* (1866) 10 M.I.A. 490, 505. See also *Hurpershad* v. *Sheo Dyal* (1876) 3 I.A. 259, 26 W.R. 55; *Shanker Baksh* v. *Hardeo Baksh* (1889) 16 Cal. 397, 16 I.A. 71.

(*k*) *Rajani Kant Pal* v. *Jaga Mohan Pal* (1923) 50 I.A. 173, 50 Cal. 439, 73 I.C. 252, ('23) A.PC. 57.

(*l*) (1923) 50 I.A. 173, 50 Cal. 439, 73 I.C. 252, ('23) A.PC. 57, *supra*.

(*m*) *Vasudeva* v. *Maguni* (1901) 24 Mad. 387, 28 I.A. 81; *Babaji* v. *Jivaji* (1930) 32 Bom. L.R. 314, 127 I.C. 204, ('30) A B. 333.

House built on ancestral land with separate funds.—If a member of a joint family builds a house on ancestral land with his own moneys, the other members have a claim on him only for compensation for their share of the land (*n*). See sec. 235 (*4*). Ss. 227, 228

228. Property jointly acquired.—(*1*) Where property has been acquired in business by *persons constituting a joint Hindu family* by their joint labour, the question arises whether the property so acquired is joint family property, or whether it is merely the joint property of the joint acquirers, or whether it is ordinary partnership property. If it is *joint family property*, the male issue of the acquirers take an interest in it by birth [s. 221, sub-s. (*1*)]. If it is the *joint property* of the joint acquirers, it will pass by survivorship, but the male issue of the acquirers do not take any interest in it by birth [s. 221, sub-s. (*2*)]. If it is *partnership property*, it is governed by the provisions of the Indian Partnership Act, 1932, so that the share of each of the joint acquirers will pass on his death to his heirs, and not by survivorship.

(*2*) If the property so acquired is acquired *with* the aid of joint family property, it becomes *joint family property* (*o*).

(*3*) If the property so acquired is acquired *without* the aid of joint family property, the presumption is that it is the *joint property* of the joint acquirers (*p*), but this presumption may be rebutted by proof that the persons constituting the joint family acquired the property not as members of a joint family, but as members of an ordinary trade partnership resting on contract, in which case the property will be deemed to be *partnership property* (*q*).

In the absence of any proof of partnership, property jointly acquired by the members of a joint family *without* the aid of joint family property is, as stated above, to be presumed to be *joint*. But is it also to be presumed to be *joint family property?* It was at one time held by the High Court of Bombay that property jointly acquired without the aid of joint family property was not joint family property and that the male issue of the joint acquirers did not acquire an interest

(*n*) *Vithoba* v. *Hariba* (1869) 6 Bom. H. C. (A.C.) 54; *Periakaruppan* v. *Arunachelam* (1927) 50 Mad. 582, 102 I.C. 290, ('27) A.M. 676 [house built by sole surviving coparcener—subsequent adoption by him—adopted son held entitled to one-half share in the land].

(*o*) *Umrithnath* v. *Goureenath* (1870) 13 M.I.A. 542; *Lal Bahadur* v. *Kanhaiya Lal* (1907) 29 All. 244, 34 I.A. 65.

(*p*) *Chandrabhaga* v. *Anadarao* (1939) Nag. 293.

(*q*) *Rampershad* v. *Sheo Churn* (1866) 10 M.I.A. 490, 506; *Gopalsami* v. *Arunachelam* (1904) 27 Mad. 32; *Chaturbhooj* v. *Daramsi* (1885) 9 Bom. 438, 445; *Samalbhai* v. *Someshwar* (1881) 5 Bom. 38; *Ganpat* v. *Annaji* (1899) 23 Bom. 144.

S. 228 in it by birth, *unless* it was thrown into the common stock (*r*). In later cases, however, it has been held that such property must be presumed to be *joint family property* (*s*), and this has been followed in Lahore (*t*), Nagpur (*u*) and Oudh (*v*). In Madras it has been held that property so acquired must be presumed to be joint family property (*w*) unless the acquirers intended to hold the property as co-owners between themselves in which case it would be their joint property (*x*).

Illustrations.

(a) Property is acquired by a joint Hindu family consisting of five brothers *without* the aid of joint family property. The presumption is that the property is joint, and not partnership property, so that if any one of the brothers dies leaving a widow, his share of the joint property will pass not to his widow, but to the surviving brothers. But if it be proved that the brothers carried on business not as members of a joint family but as partners under a partnership agreement, the share of the deceased will pass as his separate property to the widow: *Rampershad* v. *Sheo Churn* (1866) 10 M.I.A. 490, 505-506.

(b) A joint family consists of two brothers, *A* and *B*. *A* and *B* commence business in the year 1900 *without* the assistance of any ancestral property, and acquire a large fortune. A son *C* is born to *A* in the year 1905. In 1910 *A* and *B* wind up the business, and divide the acquisition between them. *A* then makes a gift of his share to a stranger. Is the gift valid? It would be valid if *C* did not acquire an interest in the joint acquisition by birth. It would be invalid, if *C* acquired an interest in the property by birth. The question, therefore, is, whether *C* acquired an interest in the joint acquisitions by birth. According to the view taken by the Bombay High Court in a case decided in 1884, the property acquired by *A* and *B* is *joint* as between them, so that on the death of either of them, the survivor would be entitled to the whole, but as regards others including *C*, it is their self-acquired property, so that *C* does not acquire any interest in it by birth, and *A* can dispose of his share at his pleasure. According to later decisions, such property is to be presumed to be *joint family* property. According to the Madras High Court, property jointly acquired by the members of a joint family, though without the assistance of joint family property, is to be presumed to be *joint family property*, so that *C* must be regarded as having acquired an interest in the property by birth, unless it be shown that *A* and *B* held the property as "co-owners," that is, held it as their self-acquired property as distinct from joint family property. The Bombay decisions are now in line with the Madras decision.

Compare sec. 45 of the Transfer of Property Act, 1882, according to which where immoveable property is purchased by two or more persons out of a *commom fund*, the purchasers are, in the absence of any contract to the contrary, entitled to hold the property in shares proportioned to their interests in the common fund. A similar rule applies where a joint purchase is made by several persons with their *separate funds*. Note that sec. 45 occurs in Chapter II of the Act, which by sec. 2 does not affect any rule of Hindu law.

(*r*) *Chaturbhooj* v. *Dharamsi* (1885) 9 Bom. 438, 445.

(*s*) *Laldas* v. *Motibai* (1908) 10 Bom. L. R. 175; *Haridas* v. *Devkuvarbai* (1926) 50 Bom. 443, 97 I.C. 820, ('26) A.B. 408 [property jointly acquired by father and sons]. See also *Karsondas* v. *Gangabai* (1908) 32 Bom. 479.

(*t*) *Sanwal Das* v. *Kure Mal* (1928) 9 Lah. 470, 109 I.C. 779, ('28) A.L. 224.

(*u*) *Sitalprasad* v. *Ram Prasad* (1944) Nag. 17.

(*v*) *Lachmi Narain* v. *Musaddi Lal* (1942) 17 Luck. 327, 197 I.C. 247, ('42) A.O. 155.

(*w*) No such presumption arises where the business is carried on by *some* only of the members of the joint family. *Sudarsanam* v. *Narasimhulu* (1902) 25 Mad. 149.

(*x*) (1902) 25 Mad. 149, 155-156, *supra*.

229. Survivorship—Devolution of deceased coparcener's interest.—(*1*) On the death of a coparcener, his interest in the coparcenary property does not pass by succession to his heirs. It passes by survivorship to the other coparceners, subject to the rule that where the deceased coparcener leaves male issue, they represent his rights to a share on partition (*y*), and are his sole legal representatives for purposes of execution of money decrees passed against him (*z*). The rule of survivorship here stated is, however now subject to the right of the widow of a deceased coparcener to take her husband's share. See sec. 35. S. 229

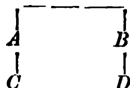
(*2*) The right of a coparcener to take by survivorship is defeated in the following cases :—

(i) where the deceased coparcener has sold or mortgaged his interest, in provinces where such sale or mortgage is allowed by law [s. 259];

(ii) where the interest of the deceased coparcener has been *attached in his lifetime* in execution of a decree against him. A mere decree obtained by a creditor, not followed up by an attachment in the lifetime of the debtor, will not defeat the right of survivorship, unless the judgment-debtor stood in the relation of father, paternal grandfather or great-grandfather to the surviving coparceners [ss. 289, 292 (*4*)];

(iii) where the interest of the deceased coparcener has vested in the Official Assignee or Receiver on his insolvency (*a*) [s. 265]. On the annulment of insolvency the interest which vested in the Official Receiver revests under sec. 37 of the Provincial Insolvency Act in the insolvent and if on that date he is not alive, it goes to his heirs under the law (*b*).

Sub-sec. (*1*).—What passes to the male issue is not a share, but the right to have a share on partition. Suppose *A* and *B* are two brothers, and that *A* has a son *C* and *B* has a son *D*. On *A*'s death, his undivided interest will pass to the surviving coparceners, *B*, *C* and *D*. *C* cannot, while the family remains joint, claim for himself a moiety of the *income* alleging that it represents his father's share. But if the family come to a partition, *C* will take one-half of the property, that being his father's share, and *B* and *D* will take the other half . see sec. 321 below.



(*y*) *Katama Natchiar* v. *The Rajah of Shiraqunga* (1863) 9 M.I.A. 543, 615; *Musammat Lakhpati* v. *Parmeshwar* (1930) 5 Luck. 631, 125 I.C. 414, ('31) A.O. 108.

(*z*) *Sheo Gopal* v. *Firm Ganesh Das Ram Gopal* (1938) 13 Luck. 241, 168 I.C. 268, ('37) A.O. 327.

(*a*) *Fakirchand* v. *Motichand* (1883) 7 Bom. 438.

(*b*) *Lakshmanan Chettiar* v. *Srinivasa Iyengar* (1937) Mad. 203, 166 I.C. 378, ('37) A.M. 131.

Ss. 229, 230

Sub-sec. (2), *clause* (i).—According to the Mitakshara law as applied in the Bombay and Madras Presidencies, a coparcener can sell or mortgage his interest in the coparcenary property, but not according to that law as applied in Bengal and the United Provinces (sec. 260). Therefore, in Bombay and Madras, if a coparcenary consists of *A* and *B*, and *A* sells his interest to *X*, and then dies, *B* cannot claim *A*'s interest by survivorship. That interest has passed to *X* by purchase. But no Hindu governed by the Mitakshara law can dispose of by *gift* or *will* his undivided interest in coparcenary property in any part of British India [secs. 258, 368]. Therefore if *A* makes a gift by way of bequest of his undivided interest in the coparcenary property to *X*, that interest will not on his death pass to *X*, but it will pass to *B*, the surviving coparcener.

Clause (ii).—*A* and *B* are coparceners. *C* obtains a decree against *A* and *attaches* *A*'s interest in the coparcenary property. *A* then dies. *A*'s interest having been attached in his lifetime *B* is not entitled to that interest by survivorship, see sec. 289. *C* is entitled to have *A*'s interest sold in execution even after *A*'s death. But if *C* had merely obtained a decree against *A*, and no attachment had been levied on *A*'s interest in *A*'s *lifetime*, *A*'s interest would pass to *B* by survivorship unless *A* happened to be *B*'s father or grandfather or great-grandfather in which case *C* could attach *A*'s interest even after *A*'s death. [The Code of Civil Procedure, 1908, secs. 53 and 50]. See sec. 289 below.

Clause (iii).—*A* and *B* are coparceners. *A* becomes insolvent and a vesting order is made in insolvency. The effect of this order is to vest *A*'s interest in the coparcenary property in the Official Assignee. *A* then dies. *B* is not entitled to *A*'s interest by survivorship. That interest will remain vested in the Official Assignee for the benefit of *A*'s creditors.

230. Separate property.—Property acquired in any of the following ways is the separate property of the acquirer; it is called "self-acquired" property, and is subject to the incidents mentioned in sec. 222 above :—

(1) *Obstructed heritage.*—Property inherited as obstructed heritage (*sapratibandha daya*), that is, property inherited by a Hindu from a person other than his father, father's father, or father's father's father [see ss. 218 and 223, sub-s. (2)].

Property inherited as unobstructed heritage (*apratibandha daya*) is ancestral; see sec. 223, sub-sec. (1).

As to property inherited from a maternal grandfather, see sec. 223, sub-sec. (2).

(2) *Gift.*—A gift of a *small* portion of ancestral moveables made through affection by a father to his male issue is his separate property (*c*) [s. 225].

As to gifts and bequests of *separate* property by a father to his *sons*, see sec. 223 sub-sec. (5).

(3) *Government grant.*—Property granted by Government to a member of a joint family is the separate property of the donee (*d*), unless it appears from the grant that it was intended for the benefit of the family (*e*).

(*c*) See sec. 225, and the cases there cited.
(*d*) *Katama Natchair* v. *Rajah of Shivagunga* (1863) 9 M.I.A. 543, 610.
(*e*) *Sri Mahant Govind* v. *Sitaram* (1899) 21 All. 53, 20 I.A. 195.

(4) *Property lost to family.*—Ancestral property lost to the family, and recovered by a member without the assistance of joint family property. See sec. 232 below. Ss. 230, 231

(5) *Income of separate property.*—The income of separate property, and purchases made with such income (*f*).

(6) *Share on partition.*—Property obtained as his share on partition by a coparcener who has no male issue. See sec. 223 (*4*) above.

(7) *Property held by sole surviving coparcener.*—Property held by a sole surviving coparcener, when there is no widow in existence who has power to adopt (*g*).

(8) *Separate earnings.*—Separate earnings of a member of the joint family [sec. 231].

(9) *Gains of learning.*—All acquisitions made by means of learning are now declared by the Hindu Gains of Learning Act, 1930, to be the separate property of the acquirer [s. 231A].

It is not to be supposed that every property held by a coparcener is coparcenary property. A coparcener may possess separate property of his own and such property is entirely at his disposal: see sec. 222 above. Thus the nine kinds of property described in this section are separate property. *Separate* property is also called *self-acquired* property. Self-acquired property, in its technical sense, means property obtained by a Hindu *without any detriment to ancestral property.* As to property described in cls. (1), (2), (3) and (5) of this section it is clear that it cannot be said to be acquired at the expense of the patrimony or ancestral estate. Such property is, therefore, self-acquired in the technical sense of the term. As to property described in cl. (4), it is a question of fact as to whether it constitutes self-acquired property or not. In practice the expression "self-acquired" property is used as referring to property acquired by a Hindu by his own exertions without the assistance of family funds.

231. Separate earnings—gains of science.—The income of a member of a joint family is his separate property, if it has been obtained—

(a) by his own exertions, *and*

(b) without "any detriment to the father's estate," that is, without the aid of joint family property (*h*).

(*f*) *Krishnaji* v. *Moro Mahadev* (1891) 15 Bom. 32.

(*g*) See *Bachoo* v. *Mankorebai* (1907) 31 Bom. 373, 34 I.A. 107.

(*h*) *Somasundara* v. *Ganga* (1904) 28 Mad. 386; *Rajamma* v. *Ramakrishnayya* (1905) 29 Mad. 121 [Insurance premium paid out of self-acquired property—Insurance money held to be separate property]

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But it is joint family property if it has been earned at the expense of joint family property (*i*).

For instance gifts to a Purohit for private services rendered by him are his separate property (*j*).

A member of a joint family can preempt the property of the family sold by the manager provided he does it out of his separate funds and intends to keep it as his separate property (*k*).

The consent by a member of a joint family to the sale of family property by the manager does not make him vendor and he can preempt the property (*l*).

231A. Gains of learning—gains of science.—(*1*) Before the Hindu Gains of Learning Act, 1930, two propositions were well established, namely, (1) that income earned by a member of a joint family by the practice of a profession or occupation requiring *special* training was joint family property, if such training was imparted *at the expense of joint family property*; and (2) that gains made by personal labour and without the aid of joint family funds by a member of a joint family, who was maintained out of joint family funds and received no more than an *ordinary* education suitable to his position as a member of the family, were the self-acquired property of such member.

(*2*) By the Hindu Gains of Learning Act it is provided that notwithstanding any custom, rule or interpretation of the Hindu Law, no gains of learning shall be held not to be the exclusive and separate property of the member of the joint family who acquires them merely by reason of—

(a) his learning having been, in whole or in part, imparted to him by any member, living or deceased, of his family, or with the aid of joint funds of his family, or with the aid of the funds of any member thereof, or

(b) himself or his family having, while he was acquiring such learning, been maintained or supported, wholly or in part, by the joint funds of his family, or by the funds of any member thereof.

" Learning " is defined in the Act as meaning education, whether elementary, technical, scientific, special or general,

(*i*) *Tottempudi* v. *Tottempudi* (1904) 27 Mad. 228; *Somasundara* v. *Ganga* (1904) 28 Mad. 386; *Rajamma* v. *Ramakrishnayya* (1906) 29 Mad. 121 [insurance premium paid out of self-acquired property—insurance money held to be separate property].

(*j*) *Hanso Pathak* v. *Harmandi Pathak* (1934) 56 All. 1026, 151 I.C. 11, ('34) A.A. 851.

(*k*) *Ram Naresh* v. *Mst. Ganga Dei* (1944) Luck. 257.

(*l*) *Hiwanchall Singh* v. *Ayodhya Singh* (1929) 4 Luck. 370 (F.B.)

and training of every kind which is usually intended to enable a person to pursue any trade, industry, profession or avocation in life. Ss. 231A, 232

"Gains of learning" are defined as meaning all acquisitions of property made substantially by means of learning, whether such acquisitions be made before or after the commencement of the Act, and whether such acquisitions be the ordinary or the extraordinary result of such learning.

The Act came into force on the 25th July, 1930. It is set out in Appendix X below. Under the Act all gains of learning, *whether made before or after the commencement of the Act* constitute the self-acquired property of the acquirer.

The Hindu texts classed "gains of science," if the knowledge of "science" was acquired at the expense of joint family funds, as joint family property. The term "science" was interpreted by the Courts to mean special as distinguished from ordinary learning. It was accordingly held that gains of learning imparted at the expense of joint family property were joint family property if the learning was *special* learning but they were self-acquired property if the learning was *ordinary* learning (*m*). The Hindu Gains of Learning Act places gains of both kinds on the same footing, and declares all gains of learning, whether the learning be special or ordinary, to be the self-acquired property of the acquirer.

232. Recovery of ancestral property lost to the family.— Where the members of a joint family have been wrongfully dispossessed or adversely kept out of possession of joint property for a long time, and such property is subsequently recovered by an individual member of the family without the assistance of joint funds, then, if the property is recovered by the father, he takes the whole as his separate or self-acquired property, whether it be moveable or immoveable; but if it is recovered by any other member of the family, then, if the property be moveable, he takes the whole as his separate or self-acquired property, but if it be immoveable, he takes one-fourth first as reward for the recovery, and the remainder has to be equally divided among all the coparceners including the recoverer (*n*).

(*m*) *Metharam* v. *Rewachand* (1918) 45 I.A. 41, 45 Cal. 666, 44 I.C. 269, ('17) A.PC. 105 [broker and money lender]; *Gokal Chand* v. *Hukum Chand—Nath Mal* (1921) 48 I.A. 162, 2 Lah. 40, 60 I.C. 379, ('21) A.PC. 35 [Indian Civil Service]; *Luximon Row* v. *Muller Row* (1831) 21 Knapp. 60 [Prime Minister]; *Lakshman* v. *Jamnabai* (1882) 6 Bom. 225 [pleader and Sub-Judge]; *Pauliem* v. *Pauliem* (1877) 1 Mad. 252, 4 I.A. 109; *Chalakonda* v. *Chalakonda* (1864) 2 Mad. H. C. 56 [dancing girl]; *Durvasula* v. *Durvasula* (1872) 7 Mad. H. C. 47 [pleader]; *Boologam* v. *Swornam* (1882) 4 Mad. 330 [dancing girl]; *Bai Manchha* v. *Narotamdas* (1868) 6 Bom. H.C.A.C. 1 [vakil]; *Dhunookdharee* v. *Gunpat* (1868) 11 Beng. L. R. 201, 10 W. R. 122, *Jugmohandas* v. *Mangaldas* (1886) 10 Bom 528, 555-559 [mill manager]; *Krishnaji* v. *Moro Mahadev* (1891) 15 Bom. 32 [karkun]; *Lachmin Kuar* v. *Debi Prasad* (1898) 20 All. 435 [army contractor]; *Durga Dat* v. *Ganesh Dat* (1910) 32 All. 305, 5 I.C. 400 [astrologer].

(*n*) *Bajaba* v. *Trimbak* (1910) 34 Bom. 106, 4 I.C. 255; *Visalatchi* v. *Annaswamy* (1870) 5 Mad. H. C. 150; *Bissesur* v. *Seetul Chunder* (1868) 9 W.R. 69 s.c., 8 W.R. 13; *Shamnarain* v. *Rughooburdyal* (1878) 3 Cal. 508, 511; *Jugmohandas* v. *Mangaldas* (1886) 10 Bom. 528, 551; *Bolakee* v. *Court of Wards* (1870) 14 W.R. 34; *Naraganti* v. *Venkatachalpati* (1882) 4 Mad. 250, 259.

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The rule laid down in this section applies only to coparcenary property lost to the family, but recovered by a coparcener without the aid of family funds *from a stranger holding adversely to the family.* It does not apply to any other case. Thus where certain family property was allotted to a member of one branch of the family *in virtue of a compromise,* and was *subsequently purchased* by a member of another branch with his own money, it was held that it was the self-acquired property of the purchaser, and that his brother who was joint with him was not entitled to any interest in it (*o*). In the last mentioned case it was contended on behalf of the brother that one-fourth of the property should be given to the purchaser, and that the remaining three-fourths should be divided equally between the two brothers, but this contention was overruled.

233. Presumption as to coparcenary and coparcenary property.—Where a suit is brought by a Hindu to recover property, alleging that it is his self-acquired property, and the defendant contends that it is joint family property, or where a suit is brought by a Hindu for partition of property alleging that it is joint family property and the defendant contends that it is his self-acquired property, the question arises upon whom the burden of proof lies. The following are the leading rules on the subject.—

(*1*) *Presumption that a joint family continues joint.*—Generally speaking, " the normal state of every Hindu family is joint. Presumably every such family is joint in food, worship and estate. In the absence of proof of division, such is the legal presumption " (*p*). In other words, " given a joint Hindu family, the presumption is, until the contrary is proved, that the family continues joint " (*q*). The presumption of union is the greatest in the case of father and sons (*r*). " The strength of the presumption necessarily varies in every case. The presumption is stronger in the case of brothers than in the case of cousins, and the farther you go from the founder of the family the presumption becomes weaker and weaker " (*s*). The reason is that " brothers are for the most part undivided ; second cousins are generally separated " (*t*) ; and third cousins are for the most part separated (*u*).

In what cases does the above presumption apply?—The presumption that a Hindu family continues to be joint is

(*o*) *Bajaba* v. *Trimbak* (1910) 34 Bom. 106, 4 I.C. 255.

(*p*) *Neelkisto Deb* v. *Beerchunder* (1869) 12 M.I.A. 523, 540; *Naragunty* v. *Vengama* (1861) 9 M.I.A. 66, 92; *Rewan Persad* v. *Radha Beeby* (1856) 4 M.I.A. 137, 168. See also *Mst. Cheetha* v. *Miheen Lall* (1867) 11 M.I.A. 369; *Mst. Bhagwani* v. *Mohan Singh* (1925) 29 C.W.N. 1037, 88 I.C. 385, ('25) A. PC. 132 [P.C.].

(*q*) *Nageshar Baksh Singh* v. *Ganesha* (1920) 47 I.A. 57, 70, 42 All. 368, 381, 56 I.C. 306, ('20) A.PC. 46; *Raghubardyayal* v. *Ramdulare* (1928) 6 Rang. 367, 111 I.C. 839, ('28) A. R. 206 ; *Pandit Mohanlal* v. *Pandit Ramdayal* (1941) 16 Luck. 708, 194 I.C. 61, ('41) A.O. 331.

(*r*) *Malakchand* v. *Hira Lal* (1936) 11 Luck. 449, 157 I.C. 945, ('35) A.O. 510.

(*s*) *Yellappa* v. *Tippanna* (1929) 56 I.A. 13, 19, 53 Bom. 213, 114 I.C. 13, ('29) A.PC. 8.

(*t*) *Moro Vishvanath* v. *Ganesh* (1873) 10 Bom. H.C. 444, 468.

(*u*) *Yellappa* v. *Tippanna, supra.*

mainly available when the question arises whether a specific property *which was admittedly joint at one time* has continued to be joint or it has ceased to be joint *by virtue of a separation*. If a joint family possessed property which was admittedly joint, the *presumption* would be that the property continues to be joint, and the burden would lie upon the member who claims it as his separate property to prove that there was a partition and that he got it on such partition (*v*). The presumption is peculiarly strong in the case of brothers (*w*), but almost nil in the case of third and fourth cousins (*x*). S. 233

Where some members alienated joint family property and others sued to set aside that alienation and compromised the suit by a payment to the alienee out of joint funds and retained a portion of the property sold, it was held that that portion belonged to the whole family (*y*).

(*1A*) Even where a Hindu undivided family has ceased to be such in law, it may be deemed to an undivided family for the purposes of the Income Tax Act under sec. 25A of that Act (*z*).

(*2*) *No presumption that a joint family possesses joint property.*—There is *no presumption* that a family, because it is joint, possesses joint property or any property (*a*). When in a suit for partition, a party claims that any particular item of the property is joint family property (*b*), or when in a suit on a mortgage, a party contends that the property mortgaged is joint family property (*c*), the burden of proving that it is so rests on the party asserting it, though circumstances may readily cause the onus to be discharged. To render the property joint the plaintiff must prove that the family was possessed of some property with the income of which the property could have been acquired (*d*) or from which the presumption could be drawn that all the property possessed by the family is joint family property (*e*) or that it was purchased with joint family

(*v*) See *Prit Koer* v. *Mahadeo Purshad* (1895) 22 Cal. 85, 21 I.A. 134.

(*w*) *Nageshar Baksh Singh* v. *Ganesha* (1920) 47 I.A. 57, 42 All. 368, 381, 56 I.C. 306, ('20) A.PC. 46.

(*x*) *Yellappa* v. *Tippanna* (1929) 56 I.A. 13, 53 Bom. 213, 114 I.C. 13, ('29) A.PC. 8.

(*y*) *Bhagwan Singh* v. *Behari Lal* (1938) Nag. 221, 172 I.C. 43, ('37) A.N. 237.

(*z*) *Sardar Bahadur Sardar Indra Singh* v. *The Commissioner of Income-tax, Bihar & Orissa* (1943) 22 Pat. 55, 206 I.C. 609, ('43) A.P. 169.

(*a*) *Kamala Kant Gopalji* v. *Madhavji Maghji* (1935) 59 Bom. 573, 37 Bom. L. R. 405, 158 I.C. 145, ('35) A.B. 343.

(*b*) *Annamalai Chetty* v. *Subramanian Chetty* (1929) 31 Bom. L.R. 280, 113 I.C. 897, ('29) A.PC. 1; *Jogi Reddi* v. *Chinnabbi Reddi* (1929) 56 I.A. 6, 52 Mad. 83, 114 I.C. 5, ('29) A.PC. 13, is not an authority for the proposition in the text. The suit was by the plaintiff against his brothers and his sister's son who was a Christian, and the contest was as to certain property standing in the name of the sister's son.

(*c*) *Rai Shadi Lal* v. *Lal Bahadur* (1933) 35 Bom. L.R. 308, 142 I.C. 739, ('33) A.PC. 85.

(*d*) *Venkatramayya* v. *Seshamma* (1937) Mad. 1012, 170 I.C. 107, ('37) A.M. 538; *Vythianatha* v. *Varadaraja* (1938) Mad. 696, ('38) A.M. 841; *Janakamma* v. *Chinnarao* (1945) Mad. 378.

(*e*) *Kamala Kant Gopalji* v. *Madhavji Maghji*, *supra*.

S. 233 funds, such as the proceeds of sale of ancestral property (*f*) or by joint labour. *None of these alternatives is a matter of legal presumption*. It can only be brought to the cognizance of a Court in the same way as any other fact, namely, by evidence (*g*).

When a nucleus of joint family property is *proved* or *admitted* a presumption arises that the whole of the property of the joint family is joint including any acquisition by a member of the joint family (*h*). But no such presumption would arise if the nucleus is such that with its help the property claimed to be joint could not have been acquired. In order to give rise to the presumption the nucleus must be such that with its help the property claimed to be joint could have been acquired (*i*). Such being the presumption, if any member of the family claims any portion of the property as his separate property the burden lies upon him to show that it was acquired by him in circumstances which would constitute it his separate property. He may do so by showing that the income of the existing ancestral property was employed in other ways (*j*). If he adduces no evidence, the presumption that the property was joint family property, must prevail (*k*). The mere fact that it was purchased in his name and that there are receipts in his name respecting it does not render the property his separate property, for all that is perfectly consistent with the notion of its being joint property. But if, in addition to the fact that certain property stands in the name of one of the members, *A.B.*, there be these further facts, namely, that some other members of the family had acquired separate property with their own moneys and dealt with it as their own without reference to the rest of the family, and that *A.B.* was allowed by the family to appear to the world to be the sole owner, the presumption that the property is joint is weakened, and the

(*f*) *Ramnath* v. *Chiranji Lal* (1935) 57 All., 605 [F.B.], 155 I.C. 132, ('35) A.A. 221.

(*g*) *Shiv Golam* v. *Baran* (1865) 1 Beng. L.R., A.C. 164; *Moolji* v. *Gokuldas* (1884) 8 Bom. 154; *Nanabhai* v. *Achratbai* (1888) 12 Bom. 122 [no presumption that property is ancestral]; *Toolseydas* v. *Premji* (1889) 13 Bom. 61; *Dwarka Prasad* v. *Jamna Das* (1911) 13 Bom. L.R. 133, 9 I.C. 948; *Ram Kishan* v. *Tunda Mal* (1911) 33 All. 677, 10 I.C. 543; *Daji* v. *Laxman* (1927) 29 Bom. L.R. 122, 100 I.C. 937, ('27) A.B. 110; *Sanwal Das* v. *Kure Mul* (1928) 9 Lah. 470, 109 I.C. 779, ('28) A.L. 224; *Musammat Brij Kunwar* v. *Rai Bahadur Pandit Sanakta Prasad* (1930) 5 Luck. 400, 123 I.C. 849, ('30) A.O. 39 [no presumption that property ancestral].

(*h*) *Gulabchand Lala* v. *Mannilal Lala* (1941) 16 Luck. 302, 192 I.C. 643, ('41) A.C.1, 230.

(*i*) *Babu Bhai Girdhar Lal* v. *Ujamlal Hargovindas* (1937) Bom. 708, 39 Bom. L.R. 846, 171 I.C. 623, ('37) A.B. 446.

(*j*) *Sher Mohammad Khan* v. *Ramratam* (1938) Nag. 233, 173 I.C. 572, ('38) A.N. 87.

(*k*) *Madho Tewari* v. *Mata Din Tewari* (1935) 10 Luck. 61, 149 I.C. 244, ('34) A.O. 293.

burden of proving that it is joint will lie on those who allege that it is joint (*l*). S. 233

A and his two sons *B* and *C* live as members of a joint family. *It is proved that* in the year 1890 the father had in his hands a considerable *nucleus of ancestral property.* In the year 1895 the father purchases certain immoveable property in his own name, and bequeaths it by his will to *B*, alleging in the will that it was his self-acquired property. Upon these facts the presumption is that the property was purchased by the father out of the income of ancestral property, and the property is therefore joint. The burden of proving that the subsequently acquired property was the separate property of the father lies on him who alleges that it was his separate property, that is it lies on *B* (*m*). The statement in the father's will that the property was his self-acquired property is not evidence upon the question whether the property was joint or self-acquired (*n*).

(*3*) A member of a joint family who engages in trade can make separate acquisitions of property for his own benefit; and unless it can be shown that the business grew from a nucleus of joint family property, or that the earnings were blended with joint family estate, they remain his self-acquired property (*o*). See sec. 234 (*4*).

In the case of members of a joint family, the mere fact that each or any of them had *small* transactions of his own does not prove that they were necessarily separate (*p*).

(*4*) Where it is proved or admitted that a partition has already taken place, the burden lies upon him who alleges that a portion of the family property is still joint property (*q*).

A Hindu, who had a son *A* and *A*'s son *B* living with him, made a deed of gift of his property in favour of his grandson *B*. The property was described in the deed as the self-acquired property of the donor, and the deed was attested by his son. It was shown that the son had knowledge of the contents of the deed. It was held that the above facts led to the inference that the property was self-acquired (*r*).

(*5*) Onus, however, as a determining factor *of the whole case*, can only arise if the Court finds the evidence pro and con so evenly balanced that it can come to no definite conclusion. Then the onus will determine the matter. But if the Court after hearing and weighing the evidence comes to a definite conclusion, the need for placing the onus does not arise (*s*).

(*l*) *Dhurm Das* v. *Shama Soondri* (1843) 3 M.I.A. 229, 240; *Gopeekrist* v. *Gungapersad* (1854) 6 M.I.A. 53 [purchase in name of son]; *Prankishen* v. *Mathoora Mohun* (1865) 10 M.I.A. 403, 411-412; *Umrithnath* v. *Goureenath* (1870) 13 M.I.A. 542; *Sree Raja Yanumula* v. *Yanumula* (1870) 13 M.I.A. 333; *Bodh Singh* v. *Gunesh Chunder* (1874) 12 Beng. L.R. (P.C.) 317; *Bissessuar Lall* v. *Luchmassur Singh* (1879) 5 Cal. L.R. 477, 479, 6 I.A. 233, 236; *Gajendar* v. *Sardar Singh* (1896) 18 All. 176; *Abhaidat Singh* v. *Ragho* (1926) 1 Luck. 1, 91 I.C. 976, ('26) A.O. 77; *Johnston* v. *Gopal Singh* (1931) 12 Lah. 546, 555-556, 133 I.C. 628, ('31) A.L. 419. See also *Atar Singh* v. *Thakur Singh* (1908) 35 I.A. 206, 35 Cal. 1039.

(*m*) *Lal Bahadur* v. *Kanhaiya Lal* (1907) 29 All. 244, 34 I.A. 65.

(*n*) *Tottempudi* v. *Tottempudi* (1904) 27 Mad. 228.

(*o*) *Annamalai Chetty* v. *Subramanian Chetty* (1929) 31 Bom. L.R. 280, 113 I.C. 897, ('29) A.PC. 1.

(*p*) *Deonarain* v. *Agyan Ram* (1927) 31 C.W.N. 533, 101 I.C. 249, ('27) A.PC. 52.

(*q*) *Vinayak* v. *Dattoo* (1901) 25 Bom. 367.

(*r*) *Kallianji* v. *Bezanji* (1908) 32 Bom. 512.

(*s*) *Robins* v. *National Trust Co.* (1927) A.C. 515, 520.

Ss. 233, 234 In the words, the question of onus, at the close of a case, only becomes important if the circumstances are so ambiguous that a definite conclusion is impossible without resort to it (*t*).

234. Ancestral business and its incidents.—(*1*) In Hindu law a business is a distinct heritable asset. Where a Hindu dies leaving a business, it descends like other heritable property to his heirs. If he dies leaving male issue, it descends to them. In the hands of the male issue it becomes joint family business, and the firm which consists of the male issue becomes a joint family firm. The joint ownership so created between the male issue is not an ordinary partnership arising out of a *contract*, but a family partnership created *by the operation of law* (*u*). Therefore, the rights and liabilities of the coparceners constituting the family firm are not to be determined by exclusive reference to the provisions of the Indian Partnership Act, 1932, but must be considered also with regard to the general rules of Hindu law which regulate the transactions of joint families (*v*). A Hindu joint family business does not cease to be so if in addition to the heirs of the deceased owner, it is also owned by his daughter married to a Gharjamai and by other members and relations who are *de facto* members of the family, provided the proceeds of such business are utilised for the legitimate expenses of the family (*w*). The following are the points of distinction between a partnership and a joint Hindu family firm:—

(i) *Dissolution by death.*—A joint family firm is not dissolved by the death of a coparcener (*x*). An ordinary partnership is dissolved by the death of a partner.

(ii) *Right to accounts.*—A coparcener is not entitled, on severing his connection with the family firm, to ask for accounts of *past* profits and losses (*y*) [sec. 238]. It is otherwise in the case of a partner.

(iii) *Power to contract debts.*—The manager of a joint family has an *implied* authority to contract debts and pledge

(*t*) *Sime Darby & Co.* v. *Official Assignee* (1928) 30 Bom. L.R. 290, 291, 107 I.C. 233, ('28) A.PC. 77; *Yellappa* v. *Tippanna* (1929) 56 I.A. 13, 53 Bom. 213, 114 I.C. 13, ('29) A.PC. 8.

(*u*) *Lala Baijnath Prasad* v. *Ram Gopal Lachmi Narayan* (1938) 1 Cal. 369; *Gulabchand Lala* v. *Mannilal Lala* (1941) 16 Luck 302, 192 I.C. 643, ('41) A.O. 230.

(*v*) *Ramlal* v. *Lakhmichand* (1861) 1 Bom. H.C. App. ll.

(*w*) *Nibaran Chandra Saha* v. *Lalith Mohan Brindaban Saha* (1938) 2 Cal. 368.

(*x*) *Samalbhai* v. *Someshwar* (1881) 5 Bom. 38; *Haroon Mahomed, in the matter of* (1890) 14 Bom. 189, 191; *Lala Baijnath Prasad* v. *Ram Gopal Lachmi Narayan* (1938) 1 Cal. 369.

(*y*) 5 Bom. 38, *supra*; *Ganpat* v. *Annaji* (1899) 23 Bom. 144. As to the rights of a minor coparcener, see *Damodardas* v. *Uttamram* (1893) 17 Bom. 271, 279.

the credit and property of the family for the ordinary purposes of the family business (*z*). Such debts, if incurred in the ordinary course of business, are binding on the family property including the interest of the minor coparceners therein (*a*). But the manager alone has such authority; no other coparcener has it (*b*). In the case of an ordinary partnership, *any* partner can bind his coparceners by debts incurred in the ordinary course of the partnership business (the Indian Partnership Act, 1932 , s. 19). See sec. 240. **S. 234**

(iv) *Extent of liability for debts.*—In the case of an ordinary partnership, it is not only the share of each partner in the partnership property which is liable for the payment of the partnership debts, but the separate property of each partner is also liable. In the case of debts contracted by a manager, in pursuance of his implied authority in the ordinary course of the family business, there is a distinction between the liability of a manager and the liability of his coparceners. The manager is liable not only to the extent of his share in the joint family property, but being a party to the contract, he is liable personally, that is to say, his separate property is also liable. But as regards the other coparceners, they are liable only to the extent of their interest in the family property, *unless*, in the case of adult coparceners, the contract sued upon, though purporting to have been entered into by the manager alone, is in reality one to which they are actual contracting parties, or one to which they can be treated as being contracting parties by reason of their conduct, or one which they have subsequently ratified (*c*); and, in the case of minor coparceners, unless the contract has been ratified by them on attaining majority (*d*). See cl. v. below, and sec. 240 (*4*).

(*z*) *Ramlal* v. *Lakmichand* (1861) 1 Bom. H.C. App. li; *Bemola* v. *Mohun* (1880) 5 Cal. 792; *Rampartab* v. *Foolibai* (1896) 20 Bom. 767, 777-779; *Sakrabhai* v. *Maganlal* (1902) 26 Bom. 206, 215; *Morrison* v. *Verschayle* (1901) 6 C.W.N. 429; *Ram Krishna* v. *Ratan Chand* (1931) 58 I.A. 173, 53 All. 190, 132 I.C. 613, ('31) A.PC. 136; *Bishen Singh* v. *Kedar Nath* (1921) 2 Lah. 159, 62 I.C. 800, ('21) A.L. 61; *Mt. Champa* v. *Official Receiver, Karachi* (1934) 15 Lah. 9, 144 I.C. 636, ('33) A.L. 901.

(*a*) *Ramnath* v. *Chiranji Lal* (1935) 57 All. 605 (F.B.), 155 I.C. 136, ('35) A.A. 221.

(*b*) *Krishna* v. *Krishnasami* (1900) 23 Mad. 597, 600.

(*c*) *Gokul Chand* v. *Hukam Chand—Nath Mal* (1921) 48 I.A. 162, 174, 2 Lah. 40, 52, 60 I.C. 379, ('21) A.PC. 35; *Chalamayya* v. *Varadayya* (1899) 22 Mad. 166; *Samalbhai* v. *Someshwar* (1881) 5 Bom. 38; *Sakrabhai* v. *Maganlal* (1902) 26 Bom. 206 at p. 215 [F.B.]; *Baldeo* v. *Mobarak* (1902) 29 Cal. 583; *Gokal* v. *Amarchand* (1907) 9 Bom. L.R. 1289; *Joharmal* v. *Chetram* (1915) 39 Bom. 715, 28 I.C. 538, ('15) A.B. 115; *Shiv Charan Das* v. *Hari Ram* (1936) 17 Lah. 395, 170 I.C. 418, ('37) A.L. 247; *V.R.C.T.V.R. Chettiar* v. *C.A.P.C. Chettiar* (1936) 14 Rang. 122, 162 I.C. 184, ('36) A.R. 160; *Rm. L.M.L.U. Alagammal Achi & Ors* v. *Vr. PL. M. Palaniappa Chettiar & Ors.* (1940) Mad. 1012, ('40) A.M. 580.

(*d*) *Haroon Mahomed, in the matter of* (1890) 14 Bom. 189; *Official Assignee* v. *Palaniappa* (1918) 41 Mad. 824, 49 I.C. 220, ('19) A.M. 690. See also cases cited in the preceding note.

S. 234 *Liability for torts.*—The sons who inherited a mining lease from their father were held liable for damages to the buildings above the mine caused by the working of the mine by the father, but only to the extent of the effects of the joint family in their hands (*e*).

(v) *Minors.*—In the case of an ordinary partnership where a partner is a *minor*, his share (*f*) alone in the partnership property is liable for the partnership debts. His separate property is not liable, unless he accepts the partnership on attaining the age of majority [Indian Partnership Act, 1932, s. 30]. The same rule applies to the case of minor coparceners. That is to say, the manager can pledge the family property *including the minor's interest therein* for the purposes of the family business (*g*). But the minor is liable to the extent only of his interest in the family property (*h*); his separate property is not liable for the payment of debts contracted by the manager, unless the minor accepts the partnership on attaining majority (*i*). See note below, " Minor's share."

(2) *New Business.*—Where a father was carrying on brokerage business in agricultural commodities and the son was doing similar business though the commodities were not exactly identical, it was held that the latter business was not a new business (*j*). The extension of a joint family business for the manufacture of articles, *ejusdem generis* with the articles previously manufactured, *i.e.* when the class of persons who manufacture the one usually manufacture the other is not a new business (*k*). In a Dayabhaga case the Judicial Committee held that the manager of a joint family cannot impose upon a minor member of the family the risk and liability of a *new* business started by himself and the other adult members (*l*). On the ground that the reasons for the decision equally govern Mitakshara families also, this principle has been applied to them by the Indian High

(*e*) *Ambalal Khora* v. *Bihar Hosiery Mills, Ltd.* (1937) 16 Pat. 545, 172 I.C. 19, ('37) A.PC. 1657.

(*f*) The share of which s. 247 of the Contract Act speaks is no more than a right to participate in the property of the firm after its obligations have been satisfied: *Sanyasi Charan Mandal* v. *Krishnadhan Banerji* (1922) 49 I.A. 108, 49 Cal. 560, 67 I.C. 124, ('22) A.PC. 237.

(*g*) *Ramlal* v. *Lakhmichand* (1861) 1 Bom. H.C. App. ii; *Ragunathji* v. *The Bank of Bombay* (1910) 34 Bom. 72, 2 I.C. 173; *Sanka* v. *The Bank of Burmah* (1911) 35 Mad. 692, 694-696, 11 I.C. 79; *Sanyasi Charan* v. *Asutosh* (1915) 42 Cal. 225, 233, 26 I.C. 836, ('15) A.C. 482.

(*h*) *Chockalingam* v. *Muthukaruppan* (1938) Mad. 1019, ('38) A.M. 348.

(*i*) *Bishambhar* v. *Sheo Narain* (1907) 29 All. 166; *Bishambhar* v. *Fateh-Lal* (1907) 29 All. 176; *Joykisto* v. *Nittyanund* (1878) 3 Cal. 738; *Rampartab* v. *Foolibai* (1896) 20 Bom. 767, 777 779 [business inherited by a minor carried on by his guardian]; *Lutchmanen* v. *Siva* (1899) 26 Cal. 349; *Nunna* v. *Chidaraboyina* (1903) 26 Mad. 214.

(*j*) *Bhagwan Singh* v. *Behari Lal* (1938) Nag. 221, 172 I.C. 43, ('37) A.N. 237.

(*k*) *Bahadursingh* v. *Girdharlal* (1942) Nag. 543, 200 I.C. 166, ('42) A.N. 39.

(*l*) *Sanayasi Charan Mandal* v. *Krishnadhan Banerji* (1922) 49 I.A. 108, 49 Cal. 560, 67 I.C. 124, ('22) A.PC. 237.

Courts (*m*) and by the Judicial Committee (*n*). Even where the father is the manager, he is not entitled to mortgage the joint family estate in order to provide money for one of his sons to start a new business. Such a mortgage is wholly invalid against minor coparceners (*o*). Some of the senior members of a joint family took a lease of some lands and later on executed a mortgage as security for the payment of the rent. Default having been made in the payment of rent, the mortgagee brought a suit on the mortgage and in execution of the decree made in the suit, some of the property was purchased by an auction purchaser. The latter having sued for possession it was held that as the transaction was a prudent venture and for the benefit of the family, the mortgage was binding on the family (*p*). **S. 234**

As regards adult members it has been held in India that the manager cannot impose even upon them the risk and liability of a new business started by him (*q*), unless the business is started or carried on with their consent, express (*r*) or implied (*s*) or though started by the manager only, joint funds were afterwards utilised for the business to the advantage of the joint family or its continuance was found beneficial to the family (*t*) or it was adopted as a family business by the other members who continued to enjoy the benefits of the same (*u*).

It has been held in Madras (*v*) that where a joint family consists of a father and sons, and the *father* starts a new trading business, the business must be deemed to be ancestral, and the sons whether they be adults or minors are liable for debts incurred in the business to the extent of their shares in

(*m*) *Vithal* v. *Shirappa* (1923) 47 Bom. 637, 72 I.C. 659, ('23) A.B. 265; *Inspector Singh* v. *Kharak Singh* (1928) 50 All. 776, 112 I.C. 881, ('28) A.A. 403, commented upon in *Jagat Narain* v. *Mathuradas* (1928) 50 All. 969, 116 I.C. 484, ('28) A.A. 454; *Biswanath Singh* v. *Kayastha Trading Corporation* (1929) 8 Pat. 450, 119 I.C. 405, ('29) A.P. 422. But see *Official Assignee* v. *Palaniappa* (1918) 41 Mad. 824, 835, 49 I.C. 220, ('19) A.M. 690; *Ramnath* v. *Chiranji Lal* (1935) 57 All. 605, 155 I.C. 136, ('35) A.A. 221.

(*n*) *Benares Bank Ltd.* v. *Hari Narain* (1932) 54 All. 564, 59 I.A. 300, 137 I.C. 781, ('32) A.PC. 182. See also *Ram Krishna* v. *Ratanchand* (1931) 58 I.A. 173, 53 All. 190, 132 I.C. 613, ('31) A.PC. 136.

(*o*) *Gurumuk Singh* v. *Shiv Ram* (1936) 17 Lah. 53, 157 I.C. 416, ('35) A.L. 482; *Ganesh Prasad Singh* v. *Sheo Govind Sahoo* (1937) 16 Pat. 719, 173 I.C. 242, ('38) A.P. 40.

(*p*) *Chhotey Lal Chauduri* v. *Dalip Narain Singh* (1938) 17 Pat. 386, ('38) A.P. 562.

(*q*) *Babu Lal* v. *Babu Lal* (1941) All. 343, 195 I.C. 571, ('41) A.A. 194, (1941) A.L.J. 217.

(*r*) *Tammireddi* v. *Gangireddi* (1922) 45 Mad. 281, 70 I.C. 337, ('22) A.M. 236.

(*s*) *Mahabir Prasad* v. *Amla Prasad* (1924) 46 All. 364, 79 I.C. 517, ('24) A.A. 379; [consent of adults to be presumed if family maintained out of the profits].

(*t*) *Ramnath* v. *Chiranji Lal* (1935) 57 All. 605, 155 I.C. 136, ('35) A.A. 221.

(*u*) *Budh Karan Chankani* v. *Thakur Prasad Shah* (1942) 1 Cal. 19, ('42) A.C. 311.

(*v*) *Venkatasami* v. *Palaniappa* (1929) 52 Mad. 227, 117 I.C. 716, ('29) A.M. 153 [suit on mortgage and as to a portion of the amount there was no antecedent debt.]

S. 234 the joint family property; and, further, that even if such business be not regarded as ancestral, the sons' shares are liable for the debts incurred by the father in the business, and this liability arises out of the pious obligation of the sons to pay their father's debts. If this decision is deemed to be authority for the proposition that a *new* business started by a father is ancestral for all purposes as regards his sons, then, it is submitted it is no longer good law (*w*). When the sons merely give some help to the father in business, it does not become joint family business but after the sons grow up the father and sons by their conduct may make it apparent that it has become a joint family business (*x*). See note below, " New business."

(3) *Partnership with outsiders.*—It is competent to the manager of a joint family business, acting on behalf of the family, to enter into a partnership with a stranger (*y*). But not all members of the joint family, but only such of its members as have in fact, entered into partnership with the stranger, become partners (*z*). The manager, no doubt, is accountable to the family, but the partnership is exclusively one between the contracting members including the manager and the stranger. Such a partnership would be governed by the provisions of the Indian Partnership Act, 1932, with the result that if the manager died, the partnership would be dissolved on his death. The surviving members of the family cannot claim to continue as partners with the stranger (*a*), nor can they institute a suit for a dissolution of the partnership, their position being no higher than that of sub-partners (*b*). Nor can the stranger partner sue the surviving members as partners for the manager's share of the loss. His only remedy is to proceed against the manager's estate, if any (*c*). But when a manager of a trading joint family enters into a partnership with strangers for the purpose of carrying on the same kind of business the other members are liable to the extent of their interests in the family property (*d*). On a partition between

(*w*) *Benares Bank Ltd.* v. *Hari Narain* (1932) 59 I.A. 300, 54 All. 564, 137 I.C. 781, ('32) A.PC. 182.

(*x*) *Kailashi* v *Shanker* (1945) All. 135.

(*y*) *Ramlal* v. *Lachmichand* (1861) 1 Bom. H.C. App. 11; *Bhagwan Singh* v. *Behari Lal* (1938) Nag. 221, 172 I.C. 43, ('37) A.N. 237.

(*z*) *Pichappa Chettiar* v. *Chockalingam Pillai* (1934) 36 Bom. L.R. 976 (P.C.), 150 I.C. 802, ('34) A.PC. 192.

(*a*) *Sokkanadha* v. *Sokkanadha* (1905) 28 Mad. 344.

(*b*) *Gangayya* v. *Venkataramiah* (1918) 41 Mad. 454, 43 I.C. 9, ('18) A.M. 37.

(*c*) See *Kharidar Kapra Co.* v. *Daya Kisen* (1921) 43 All. 116, 58 I.C. 765, ('21) A.A. 306.

(*d*) *Chockulingam* v. *Muthukaruppan* (1938) Mad. 1019, ('38) A.M. 848.

the members of a joint family of which the manager is a partner with a stranger, the manager is bound to realize his share of the partnership assets for the benefit of the family, and for distribution among the members thereof (*e*). But this, it is conceived, he cannot do until the term of the partnership has expired. **S. 234**

(4) *Presumption as to business carried on by a member.*—There is no presumption that a business carried on by a member of a joint family, is joint family business (*f*). Nor is there any presumption that a business carried on by such a member in partnership with a stranger is joint family business (*g*). There is no presumption that a business started by even a manager is joint family business, but if the joint family funds are utilised in opening a new branch then the new branch will be regarded as part of the old business (*h*).

See s. 240 below and notes thereto.

Minor's share.—The reason why even a minor's share is liable for payment of debts contracted by a manager in the course of the family business is that, if it were otherwise property in a family firm which is recognized by the Hindu law to be a valuable inheritance would become practically valueless to the family wherever a minor was concerned, for no one would deal with a manager if the minor were to be at liberty on coming of age to challenge the trade transactions which took place during his minority (*i*).

New business.—The first proposition in sub-sec. (2) is based on the decision of the Privy Council in *Sanyasi Charan Mandal* v. *Krishnadhan Banerji* (*j*). That was a Dayabhaga case. In that case the joint family consisted of *brothers* and the new business was started by the adult brothers. In the course of the judgment, their Lordships said: "The distinction between an ancestral business and one started like the present after the death of the ancestor as a source of partnership relations is patent. In the one case these relations result by operation of law from a succession on the death of an ancestor to an established business, with its benefits and obligations. In the other they rest ultimately on *contractual* arrangement between the parties." The decision proceeds on the ground that a minor could not become a partner by contract [Indian Contract Act, 1872, s. 11], though he might be "admitted to the benefits of the partnership" [Indian Partnership Act, 1932, s. 30]; and since a *new* business could rest only on *contractual* arrangement, a minor could not be a *partner* in such business.

Whether a business is a new business is in each case a question of fact. The fact that it had ceased to be carried on for a few years in the grandfather's lifetime does not make it a new business if it is started by the father again (*k*). Where a joint family

(*e*) 41 Mad. 454, 43 I.C. 9, ('18) A.M. 37, *supra*.
(*f*) *Vadilal* v. *Shah Khushal* (1903) 27 Bom. 157. See also *Haroon Mahomed, in the matter of* (1890) 14 Bom. 189. See *Grey* v. *Walker* (1913) 40 Cal. 523, 18 I.C. 753; *Gokal Chand* v. *Hukum Chand—Nath Mal.* (1921) 48 I.A. 162, 171, 2 Lah. 40, 49, 60 I.C. 379, ('21) A.PC. 35.
(*g*) *Mirza Mal* v. *Rameshwar* (1929) 51 All. 827, 118 I.C. 145, ('29) A.A. 536.
(*h*) *Ramnath* v. *Chiranji Lal* (1935) 57 All. 605, 155 I.C. 136, ('35) A.A. 221.
(*i*) *Ramlal* v. *Lakhmichand* (1861) 1 Bom. H.C. App. ii, lxxii, lxxiii.
(*j*) (1922) 49 I.A. 108, 114-115, 49 Cal. 560, 567-568, 67 I.C. 124, ('22) A.PC. 237.
(*k*) *Damodaram* v. *Bansilal* (1928) 51 Mad. 711, 111 I.C. 297, ('28) A.M. 566.

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carries on business in partnership with a stranger in a particular name, and the stranger retires, and on his retirement the family carries on the same business in another name, it does not make it a new business (*l*).

Separate property when liable.—A debt is contracted by the manager in the family business. The other members are not parties to the transaction, nor is the contract ratified by them. In such a case the other members, whether they be adults or minors, are liable only to the extent of their interest in the joint family property; their *separate* property is not liable. The reason is that the power of a manager to bind the other members of the family is restricted to, and does not extend beyond the joint property. The legal individuality of a coparcener is not merged in the manager as regards the coparcener's *separate property* (*m*).

Debts contracted by a widow.—As to trade debts contracted by a widow carrying on business left by husband, see s. 194A and s. 195.

III.—MANAGEMENT AND ENJOYMENT OF COPARCENARY PROPERTY.

235. Rights of coparceners.—(*1*) *Community of Interest and unity of possession.*—No coparcener is entitled to any *special* interest in the coparcenary property, nor is he entitled to *exclusive* possession of any part of the property (*n*). As observed by their Lordships of the Privy Council, "there is community of interest and unity of possession between all the members of the family" (*o*).

(*2*) *Share of income.*—A member of a joint Mitakshara family cannot predicate at any given moment what his share in the joint family property is. His share becomes defined only when a partition takes place (*p*). As no member, while the family continues joint, is entitled to any definite share of the joint property, it follows that no member is entitled to any definite share of the income of the property (*q*). The whole income of the joint family property must be brought, according to the theory of an undivided family, to the common chest or purse, and there dealt with according to the modes of enjoyment by the members of an undivided family (*r*).

(*2a*) It is competent to the manager to allot to any individual member a portion of the family property to enable him to maintain himself out of its income. Any savings out of the income and investments of such savings will be the separate property of the member (*s*).

(*l*) *Ram Krishna* v. *Ratan Chand* (1931) 58 I.A. 173, 53 All. 190, 132 I.C. 613, ('31) A.P.C. 136.

(*m*) *Chalamayya* v. *Varadayya* (1899) 22 Mad. 166, 168.

(*n*) *Naranbhai* v. *Ranchod* (1902) 26 Bom. 141, 144.

(*o*) *Katama Natchiar* v. *Rajah of Shivagunga* (1863) 9 M.I.A. 539, 543, 615.

(*p*) *Appovier* v. *Rama Suba Aiyan* (1866) 11 M.I.A. 75, 89.

(*q*) *Ganpat* v. *Annaji* (1899) 23 Bom. 144.

(*r*) (1866) 11 M.I.A. 75, 89, *supra*.

(*s*) *Bengal Insurance and Property Co., Ltd.* v. *Velayammal* (1937) Mad. 990, ('37) A.M. 571, 170 I.C. 279; *Ramayya Goundan* v. *Kolanda Goundan & Ors.* (1940) Mad. 322, ('39) A.M. 11, (1939) 2 M.L.J. 639.

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(3) *Joint possession and enjoyment.*—Each coparcener is entitled to joint possession and enjoyment of the family property. If any coparcener is excluded from joint possession or enjoyment, he is entitled to enforce his right by a suit. He is not bound to sue for *partition*. There is no reason why a Hindu coparcener, who is excluded from the enjoyment of his joint rights, should be compelled at the instance of the other coparceners and against his will to break up the joint family by bringing a suit for partition (*t*). Where a coparcener is excluded from joint possession, the proper decree to pass is to declare his right to joint possession, and, *further*, to direct that he be put into joint possession. A mere declaratory decree is of no use (*u*).

(3a) *Exclusion from joint family property.*—Where a coparcener is excluded by other coparceners from the use or enjoyment of the joint property, or any portion thereof, and the act of the defendants amounts to an ouster of the plaintiff from his enjoyment of the property, the Court may by an injunction restrain the defendants from obstructing the plaintiff in the enjoyment of the property (*v*).

Art. 127 of the Indian Limitation Act, 1908, provides a period of twelve years for a suit by a person excluded from joint family property to enforce a right to share therein from the date when the *exclusion* becomes known to the plaintiff. The fact that a coparcener voluntarily resides separately from the family and does not ask to be maintained by the family, does not amount to an exclusion from the joint family property (*w*). Nor does a refusal to partition, where there is no denial of the right to a partition (*x*).

Illustrations.

(a) *A* and *B* are members of a joint family. *A* prevents *B* from using a door or a staircase, which is the only means of access to the rooms in *B*'s occupation. *A*'s act amounts to ouster. He may, therefore, be restrained by an injunction from disturbing *B* in the use of the door or staircase: *Anant* v. *Gopal* (1895) 19 Bom. 269; *Soshi* v. *Ganesh* (1902) 29 Cal. 500.

(b) *A* and *B* are members of a joint family which owns a shop in Poona. *A* prevents *B* from entering the shop, inspecting the account books, and taking part in the management of the shop. *A* may be restrained by an injunction from excluding *B* from the joint possession and management of the shop: *Ganpat* v. *Annaji* (1899) 23 Bom. 144.

(*t*) (1902) 26 Bom. 141, *supra*; *Ramchandra* v. *Damodar* (1896) 20 Bom. 467.

(*u*) (1902) 26 Bom. 141, 145, *supra*.

(*v*) *Anant* v. *Gopal* (1895) 19 Bom. 269; *Soshi* v. *Ganesh* (1902) 29 Cal. 500, (1899) 23 Bom. 144, *supra*.

(*w*) *Sitalprasad* v. *Ram Prasad* (1944) Nag. 17.

(*x*) *Radhoba* v. *Aburao* (1929) 56 I.A. 316, 53 Bom. 699, 118 I.C. 1, ('29) A.PC. 231.

S. 235 (4) Every coparcener in an undivided family is entitled to be maintained out of the family estate. See further s. 543.

(5) *Unauthorized acts.*—A contract of suretyship entered into by a coparcener other than the manager is void and cannot be ratified (*y*). A coparcener has no right, without the consent of the other coparceners, to erect a building on land belonging to the joint family or on any portion thereof, so as to alter materially the condition of the property or to do anything with the property which would interfere with the joint enjoyment thereof. If he does so, he may be restrained by an injunction (*z*). But the remedy by way of injunction is not appropriate, if the act done is of such a character that the condition of the property is not materially altered thereby as where a wall is erected which does not interfere with the joint enjoyment of the property (*a*). See notes to sec. 227.

(6) *Right to enforce partition.*—Subject to the provisions of section 307, every adult coparcener is entitled to enforce a partition of the coparcenary property.

(7) *Alienation of undivided interest.*—No coparcener can dispose of his undivided interest in coparcenary property by gift [s. 258]. Nor can he alienate such interest even for value except in Bombay and Madras [secs. 259, 260].

(8) *Right of survivorship.*—Where a coparcener dies before partition of the coparcenary property, his undivided interest in the property devolves, not by succession upon his heirs, but by survivorship upon the surviving coparceners (*b*) [s. 229].

(9) *Manager.*—A coparcener who is a manager has certain special powers of disposition over the coparcenary property which no other coparcener has [ss. 237-251].

(10) *Father.*—A father has certain special powers of disposing of coparcenary property which no other coparcener has [sec. 256].

Partition and survivorship.—The right to enforce a partition and the right to take by survivorship go hand in hand. In fact, as observed by the Privy Council, "it is the right to partition which determines the right to take by survivorship" (*c*).

(*y*) *Malakchand* v. *Hira Lal* (1936) 11 Luck. 449, 157 I.C. 945, ('35) A.O. 510.

(*z*) *Sheopersad* v. *Leela Singh* (1874) 12 Beng. L. R. 188; *Guru Das* v. *Bijaya* (1868) 1 Beng. L.R.A.C. 108; *Vithoba* v. *Hariba* (1869) 6 Bom. H. C. A. 54. See also *Shadi* v. *Anup Singh* (1890) 12 All. 436; *Najju Khan* v. *Imtiaz-ud-din* (1896) 18 All. 115.

(*a*) *Biswambhar* v. *Rajaram* (1869) 3 Beng. L. R. Ap. 67.

(*b*) *Katama Natchiar* v. *Rajah of Shivagunga* (1866) 9 M.I.A. 543, 615.

(*c*) *Venkayyamma* v. *Venkataramanayamma* (1902) 25 Mad. 678, 687.

Injunction.—In disputes between members of a joint Hindu family relating to joint property, the exercise of the Court's jurisdiction to grant relief by injunction should be confined to acts of waste, illegitimate use of the joint property and acts amounting to ouster (*d*).

Joint possession.—The members of a joint family may agree between themselves without coming to a partition, to occupy for their convenience separate portions of the joint property. In fact, this is the general practice. It amounts to exclusive possession of the separate portion enjoyed by each member by the consent of all; it may be terminated and a completely new arrangement may be made, at any time, by the members of the family, if they think fit to do so (*e*).

236. Manager.—Property belonging to a joint family is ordinarily managed by the father or other senior member for the time being of the family. The manager of a joint family is called *karta*.

The father is in all cases naturally, and in the case of minor sons necessarily, the manager of the joint family property (*f*).

"The joint and undivided family is the normal condition of Hindu society. An undivided Hindu family is ordinarily joint not only in estate, but also in food and worship. Therefore, not only the concerns of the joint property, but whatever relates to the commensality and their religious duties and observances, must be regulated by its members or by the *manager* to whom they have expressly or by implication delegated the task of regulation" (*g*).

"So long as the members of a family remain undivided, the *senior* member of the family is entitled to manage the family properties," including even charitable properties (*h*); and is presumed to be the manager until the contrary is shown (*i*). But the senior member may give up his right of management, and a junior member may be appointed manager (*j*).

Though a son acquires by birth an interest equal to that of the father in ancestral property, yet the father by reason of his paternal relation and his position as the head of the family and its manager, is entitled to make lawful disposition of the family property in the interest of the family. Therefore, a son has no right against the will of his father to occupy any specific portion of the family property and if he does so the father may sue to eject him from it (*k*). If the son does not approve of the management of the family property by the father, his remedy is to ask for a partition of the property against the father.

It is not to be supposed that a member of a joint family who is a manager has a larger proprietary interest or has larger rights to enjoy the joint property than any other member. The only respect in which he has a superior right is that he has a power of disposition for causes recognised as just and proper under Hindu law of the whole family property, including the interest of the junior members (*l*) [sec. 242].

(*d*) *Anant* v. *Gopal* (1895) 19 Bom. 269.
(*e*) *Sheopersad* v. *Leela Singh* (1874) 12 Beng. L. R. 188, 195.
(*f*) *Suraj Bunsi Koer* v. *Sheo Persad* (1880) 5 Cal. 148, 165, 6 I.A. 88.
(*g*) *Sri Raghunadha* v. *Sri Brozo Kishore* (1876) 1 Mad. 69, 81, 3 I.A. 154, 191.
(*h*) *Thandavaroya* v. *Shunmugam* (1909) 32 Mad. 167, 169, 2 I.C. 34.
(*i*) *Varada Bhaktavatsalu & Ors* v. *Damoji-purapu Venkata Narsimha Rao* (1940) Mad. 752, 191 I.C. 369, ('40) A.M. 530.
(*j*) *Mudit* v. *Ranglal* (1902) 29 Cal. 797.
(*k*) *Baldeo Das* v. *Sham Lal* (1876) 1 All. 77.
(*l*) *Nunna* v. *Chidaraboyina* (1903) 26 Mad. 214, 221.

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237. Manager's power over income.—The manager, as the head of the family, has control over the income and expenditure, and he is the custodian of the surplus, if any. So long as he spends the income for the purposes of the family, he is not under the same obligation to economise or save as a paid agent or trustee would be. If he spends more than the other members approve, their remedy is to demand a partition (*m*). On the other hand, he is liable to make good to them their shares of all sums which he has misappropriated or which he has spent for purposes other than those in which the joint family was interested (*n*).

The family purposes referred to above are the maintenance, education, marriage, *sraddh* and other religious ceremonies of the coparceners and of the members of their respective families. In taking accounts at the time of partition, no charge is to be made against any coparcener, because in consequence of his having a larger family to maintain than others, a larger share of the joint income was spent on his family. Such expenditure is considered to be the legitimate expenditure of the whole family (*o*).

Manager not an Agent.—A manager is not an agent within the meaning of Chapter X of the Indian Contract Act, 1872 (*p*), or of cl. 12 of the Letters Patent (*q*). His position is more like that of a trustee (*q*). But it is not precisely the same as that of a trustee, for if it were so, he would be bound to economise and save, as a trustee is, which, it has been held, he is not (*r*).

238. Manager's liability to account on partition.—(*1*) In the absence of proof of misappropriation or fraudulent and improper conversion by the manager of a joint family estate he is liable to account on partition only for assets which he has received, not for what he ought or might have received if the family money had been profitably dealt with (*s*). Further, in the absence of any such proof, a coparcener seeking partition is not entitled to require the manager to account for his *past* dealings with the family property (*t*). All that he is entitled

(*m*) *Bhowani* v. *Jaggernath* (1909) 13 C. W. N. 309, 3 I.C. 241; *Tarachand* v. *Reeb Ram* (1866) 3 Mad. H. C. 177.

(*n*) *Abhaychandra* v. *Pyari Mohan* (1870) 5 Beng. L. R. 347, 349.

(*o*) (1870) 5 Beng. L. R. 347, 349, *supra*.

(*p*) *Muhammad* v. *Radhe Ram* (1900) 22 All. 307, 317; *Sri Kant Lal* v. *Siddheshwari Prasad* (1937) 16 Pat. 441, 170 I.C. 367, ('37) A.P. 455.

(*q*) *Annamalai* v. *Murugasa* (1903) 26 Mad. 544, 553, 30 I.A. 220, 228.

(*r*) *Perrazu* v. *Subbarayadu* (1921) 48 I.A. 280, 287-288, 44 Mad. 656, 663, 61 I.C. 690, ('22) A.PC. 71.

(*s*) (1921) 48 I.A. 280, 287-288, 44 Mad. 656, 663, 61 I.C. 690, ('22) A.PC. 71, *supra*; *Laxminarayan* v. *Dinker* (1943) Nag. 390, 205 I.C. 279, ('43) A.N. 181.

(*t*) *Sukhdeo* v. *Bas Deo* (1935) 57 All. 949, 157 I.C. 1013, ('35) A.A. 594.

to is an account of the family property as it exists at the time he demands a partition (*u*). But it is open to him to show that the expenditure which the manager alleges he has incurred has not in fact been incurred, or that more properties are available for partition than those disclosed by him (*v*). See sec. 305 below. **Ss. 238, 239**

(*2*) Since the institution of a suit for partition amounts to a severance of joint status, the manager is, *from and after* the date of such a suit, strictly bound to account for all receipts and expenses, and can take credit only for such expenses as have been incurred for the benefit or necessity of the estate, and the net income after deducting such expenses is to be divided among the coparceners according to their shares (*w*).

Form of decree.—As to the form of the decree, see the undermentioned case (*x*).

Minor coparceners and accounts.—The principle underlying the rule stated in this section is that if the other members of the family who are adults are dissatisfied with the management of the joint family property by the manager, they may sue for partition otherwise they will be deemed to have acquiesced in the management however grossly negligent it may be, except, of course in case of fraud or misappropriation. A distinction, however, has been drawn in some cases between the rights of those members who were adults and those who were minors during the management, and it has been held that since minors could not be deemed to have *consented* to the management, they are entitled when they attain majority, to hold the manager liable not only for acts amounting to fraud, *but also where the management has been grossly negligent and prejudicial to their interest,* the presumption, however, being that in the absence of evidence the property available for partition is such as exists at the date of the suit for partition (*y*). This distinction, it is submitted, cannot be sustained on principle. The liability to account must be the same whether the other coparceners were minors or adults during the management (*z*).

Special Agreement.—By a special agreement between the coparceners, the manager may be rendered liable to account on the footing of an ordinary agent (*a*).

239. Manager's liability to account otherwise than in a partition suit.—It has been held in Bengal that any coparcener may, *without bringing a suit for partition,* require the manager to account for his dealings with the coparcenary property and

(*u*) *Parmeshwar* v. *Govind* (1916) 43 Cal. 459, 33 I.C. 190, ('16) A.C. 500; *Balakrishna* v. *Muthusami* (1909) 32 Mad. 271, 3 I.C. 878; *Narayana* v. *Nathaji* (1904) 28 Bom. 201, 208; *Damodardas* v. *Uttamram* (1893) 17 Bom. 271; *Jugmohandas* v. *Mangaldas* (1886) 10 Bom. 528, 560-562, 581; *Konnerrav* v. *Gurrav* (1881) 5 Bom. 589, 595; *Ramnath* v. *Goturam* (1920) 44 Bom. 179-183, 54 I.C. 115, ('20) A.B. 236; *Jyotibati* v. *Lakshmeshwar* (1929) 8 Pat. 818, 120 I.C. 770, ('30) A.P. 1.

(*v*) *Tammireddi* v. *Gangireddi* (1922) 45 Mad. 281, 70 I.C. 337, ('22) A.M. 236; (1916, 43 Cal. 459, 33 I.C. 190, ('16) A.C. 500), *supra*.

(*w*) *Sri Ranga* v. *Srinivasa* (1927) 50 Mad. 865, 873-874, 104 I. C. 472, ('27.) A.M. 801.

(*x*) (1886) 10 Bom. 528, at pp. 562, 581, *supra*.

(*y*) *Damodardas* v. *Uttamram* (1893) 17 Bom. 271, 278-279; *Chukun* v. *Poran* (1868) 9 W. R. 483.

(*z*) See *Sri Ranga* v. *Srinivasa* (1927) 50 Mad. 866, 873-874, 104 I.C. 472, ('27) A. M. 801.

(*a*) *Raja Setrucherla* v. *Raja Setrucherla* (1899) 22 Mad. 473, 26 I.A. 167.

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the income thereof. If the manager refuses to render the account he may be compelled by suit to render such account (*b*).

"Suppose, for instance, that one of the members of a joint family, with a view to separate from the others, asks the manager what portion of the family income has been actually saved by him during the period of his managership. If the manager chooses to say that nothing has been saved, but at the same time refuses to give any account of the receipts and disbursements which were entirely under his control, how is the member, who is desirous of separation, to know what funds are actually available for partition?" (*c*) In the case cited above, it was contended that a coparcener was not entitled to an account from the manager, unless he also sued for partition, but it was held that a coparcener is entitled to sue for an account in order to acquaint himself with the real state of the family affairs without also suing for partition.

240. Power of manager to contract debts for family purposes and family business.—(*1*) *Implied authority to borrow money for family business* [*Vide* s. 234, (*1*) (iii) (iv) (v), and s. 270 below].

(*2*) *Implied authority to borrow money for family purposes.*—A joint Hindu family may have no business at all, and yet debts may be contracted by the manager for a joint family purpose [s. 243]. Such debts also are binding on the other coparceners to the extent mentioned in the sections referred to in sub-sec. (*1*) (*d*). The liability of a coparcener in such a case does not cease by subsequent partition (*e*). When a sole surviving coparcener incurs a debt, he must be deemed to have done so in a representative capacity, that is to say, as representing a potential joint family, which is capable by expansion of comprising more than one member (*f*).

(*3*) *Burden of proof of necessity for a loan for a family purpose or for family business.*—Where money has been borrowed by the manager on the representation that it is required for a family purpose (*g*), or for family business (*h*) and

(*b*) *Abhaychandra* v. *Pyari Mohun* (1870) 5 Beng. L. R. 347 [a Mitakshara case]; *Benoy Krishna Gosh Chaudri* v. *Amarendra Krishna Gosh Choudri* (1940) 1 Cal. 183, 186 I.C. 546, ('40) A.C. 51 [a Dayabhaya case].

(*c*) (1870) 5 Beng. L. R. 347, 350, *supra* [a Mitakshara case]. See also (1857) 6 M.I.A. 526, 539-540, *supra* [a Dayabhaga case].

(*d*) *Gharib-ullah* v. *Khalak Singh* (1903) 25 All. 407, 414-415, 30 I.A. 165; *Dwarka Nath* v. *Bungshi* (1905) 9 C. W. N. 879 [a case under the Dayabhaga law]; *Chalamayya* v. *Varadayya* (1899) 22 Mad. 166.

(*e*) *Bankey Lal* v. *Durga Prasad* (1931) 53 All. 868 [F.B.], 135 I.C. 139, ('31) A.A. 512.

(*f*) *Ramanathan Chettiar* v. *S.R.M. Ct. M. Firm* (1937) Mad. 376, 168 I.C. 731, ('37) A.M. 345. See also *Maharaja of Bobbili* v. *Zamindar of Chundi* (1912) 35 Mad. 108. Both are cases of adoption.

(*g*) *Soiru Padmanabh* v. *Narayanrao* (1894) 18 Bom. 520; *Krishna* v. *Vasudeo* (1897) 21 Bom. 808, 815; *Sunkur* v. *Gowry Pershad* (1880) 5 Cal. 321; *Mala Mal* v. *Gori* (1922) 3 Lah. 288, 66 I.C. 485, ('22) A.L. 200; *Khazana Mal* v. *Jagan Nath* (1923) 4 Lah. 200, 74 I. C. 484, ('24) A. L. 44; *Sotam Ram* v. *Parduman Ram* (1927) 8 Lah. 673, 105 I. C. 785, ('28) A. L. 103.

(*h*) *Ram Krishna* v. *Ratanchand* (1931) 58 I.A. 173, 53 All. 190, 132 I.C. 613, ('31) A.P.C. 136; following *Hunooman Persaud* v. *Musammad Babooee* (1856) 6 M. I. A. 393; *Nagendra* v. *Amar Chandra* (1903) 7 C.W.N. 725; *Ganpat Rai* v. *Munni Lal* (1912) 34 All. 135, 13 I.C. 34, (1923) 4 Lah. 200, 74 I. C. 484, ('24) A. L. 44, *supra*; *Girdhari Lal* v. *Kishen Chand* (1924) 5 Lah. 511, 85 I. C. 463, ('25) A. L. 240; *Vithal* v. *Shivappa* (1923) 47 Bom. 637, 72 I. C. 659, ('23) A.B. 265, dissenting from *Raghunathji* v. *Bank of Bombay* (1910) 34 Bom. 72, 2 I.C. 173.

the lender seeks to render the whole family property including the shares of other members of the family liable for the debt, he is not entitled to a decree against the whole family property, unless he shows that there was a necessity for the loan, *or* that he made reasonable inquiry as to the necessity for the loan (*i*) the mere existence of the business not being enough or that it is for the benefit of the family (*j*). **S. 240**

(4) *Promissory note passed by manager for family business in his own name.*—It has been held in several cases that where the manager of a joint family borrows money on a promissory note for a joint family business or to meet a joint family necessity, the other members of the joint family may be sued *on the note*, though they are not parties to the note, but their liability is limited to their share in the joint family property (*k*), unless they can be treated as contracting parties (*l*). If the suit is filed before partition, the creditor may sue the manager only and seek for a declaration that the whole joint family property is liable or he may implead the other members also. After partition, he must implead the other members in order to enable him to proceed against the portions allotted to them (*m*). Where the suit is by the endorsee of the note his remedy is against the maker only unless the endorsement is so worded as to transfer the debt also and complies with the stamp law (*n*). In such cases there is no presumption that the borrowing was for the purposes of the joint family business and the lender must prove it (*o*). In Bombay it has been held that the proper course in such a case is to sue the manager on the *note* and the other members on the *pre-existing debt*, the defences open to the parties being distinct (*p*).

A decree passed against the manager of a joint family (who is not the father) on a promissory note executed by him,

(*i*) *Mussammat Mauli* v. *Brij Lal & Ors.* (1942) Lah. 345, 205 I.C. 37, ('43) A.L. 33 (F.B.).

(*j*) *Ram Nath* v. *Chiranji Lal* (1935) 57 All. 605 [F.B.], 155 I.C. 136, ('35) A. A. 221; *Mutsaddilal* v. *Sakhir Chand* (1936) 17 Lah. 311, ('35) A.L. 735.

(*k*) *Krishna* v. *Krishnasami* (1900) 23 Mad. 597; *Baisnab* v. *Ramdhon* (1906) 11 C. W. N. 139; *Krishnanand* v. *Raja Ram Singh* (1922) 34 All. 393, 66 I. C. 150, ('22) A.A. 116; *Ragunath* v. *Sri Narain* (1923) 45 All. 434, 73 I. C. 1018, ('23) A.A. 424.

(*l*) *Srikant Lal* v. *Sidheshwari Prasad* (1937) 16 Pat. 441, 170 I.C. 357, ('37) A.P. 455; *Mutsaddi Lal* v. *Sakir Chand* (1936) 17 Lah. 311, ('35) A.L. 735.

(*m*) *Pangudaya* v. *Uthandiya* (1938) Mad. 968, 177 I.C. 188, ('38) A.M. 774.

(*n*) *Marudamuthu* v. *Kadir Basha* (1938) Mad. 568, ('38) A.M. 377; *Ramanathan Chettiar* v. *Muthuraman Naidu & Ors.* (1942) Mad. 204, 210 I.C. 3, ('42) A.M. 161, (1942) 2 M.L.J. 816.

(*o*) *Abdul Majid Khan* v. *Saraswathibai* (1934) 61 I.A. 90, 36 Bom. L.R. 225, 147 I.C. 1, ('34) A.PC. 4.

(*p*) *Vithalrao* v. *Vithalrao* (1923) 25 Bom. L. R. 151, 72 I.C. 242, ('23) A.B. 244. The point was not raised in *Krishnashet* v. *Hari* (1896) 20 Bom. 488.

S. 240 in his personal capacity, containing no direction that it shall be granted out of family property cannot be executed against the family property (q).

It has been held that where a decree has been obtained on such a *note* against the manager and a minor coparcener, it cannot be executed against the minor *personally*, his liability in law being confined only to his *share in the joint family property*, and that he cannot be arrested under such a decree either before or after he has attained majority (r).

(5) *New business.*—As to the power of a manager to start a new business, see sec. 234 (2).

Illustration.

Three brothers *A*, *B* and *C*, managing members of a joint Hindu family, borrow money from *D* for purposes of the joint family business, and execute a promissory note in favour of *D*. After the death of *B* and *C*, *D* sues *A* and the sons of *A*, *B* and *C* *on the note*. *D* is entitled to a decree enabling him to recover the money *from the joint family property*. He is also entitled to a *personal* decree against *A*, *A* being a contracting party, so as to enable him to proceed against the separate property of *A*. But he is not entitled to a personal decree against the sons of *A*, *B* or *C* for they are *not parties to the note*. According to the Bombay case referred to in the section, the suit should be against *A* *on the note*, and against the sons of *A*, *B* and *C* for the *debt*.

As to ancestral business and its incidents, see secs. 234 and 240.

Contribution.—A manager has power to borrow money for a joint family purpose on the security of the family property. But he may also borrow on his personal security. When he borrows money on his personal security, but for a family purpose, *and spends it for the benefit of the family*, he is entitled to contribution from the other members. The right to contribution arises when he *expends* the money, and not on the date on which he repays the loan. Therefore limitation runs against his claim from the former, and not from the latter date (s).

Extent of liability of other members.—It is an elementary proposition of law that *A* is not bound to pay a debt contracted by *B*, unless *B* has been authorised by *A* to incur the debt. In the case of a manager of a joint Hindu family, the manager has an *implied* authority to bind *the other members* by debts contracted by him, provided that in the case of a family business, the debts have been contracted by him for the ordinary purposes of the business, and, in other cases, the debts have been contracted for a family purpose. The authority of the manager, however, extends only to the family property; that is to say, if the manager borrows money within the scope of his authority, and the loan is not repaid, the creditor can proceed only against the family property including the shares of the other members in the property, but the other members are not bound personally so as to entitle the creditor to proceed against their separate property. The creditor can, of course, proceed against the *separate property* of the *manager*, for the manager is a party to the contract. Likewise he can proceed against the separate property

(q) *Chippagiri Nagireddi* v. *Venkachari Somappa* (1943) Mad. 248, 204 I.C. 198, ('43)A.M. 1, (1942) 2 M.L.J. 691.

(r) *Bishen Singh* v. *Kidar Nath* (1921) 2 Lah. 159, 62 I.C. 800, ('21) A.L. 61; *Jwala Prasad* v. *Bhuda Ram* (1931) 10 Pat. 503, 134 I.C. 420, ('31) A.P. 328.

(s) *Aghore Nath* v. *Grish Chunder* (1893) 20 Cal. 18.

of any other member if he is a party to the contract, or if he subsequently ratifies the contract.

241. General powers of manager of joint family business.—Besides the power to contract debts for the family business [s. 240], the manager has the power of making contracts, giving receipts, and compromising (s. 248) or discharging claims ordinarily incidental to the business. Without a general power of that kind, it would be impossible for the business to be carried on at all (*t*).

It was so laid down by the Judicial Committee in a case in which the business was a money-lending business. The principal question in that case was whether the managing members who had entered into ordinary business contracts *in their own names* on behalf of the family were entitled to sue in their own names, or whether the other members were necessary parties. It was held that they could sue in their own names (*u*). The refusal by the manager of a joint family to purchase properties sought to be pre-empted binds the coparceners (*v*).

When a father and manager of a joint family filed a petition under sec. 20 of Madras Act IV of 1938 but failed to file an application within 60 days under sec. 19 of the Act his minor son cannot apply for the same relief as the whole joint family is bound by the father's default (*w*).

242. Alienation by manager of coparcenary property for legal necessity.—(*1*) The power of the manager of a joint Hindu family to alienate joint family property is analogous to that of a manager for an infant heir as defined by the Judicial Committee in *Hunooman Persaud* v. *Musammat Babopee* (1856) 6 Moo. I. A. 393 [see note (1) below].

(*2*) The manager of a joint Hindu family has power to alienate for value joint family property, so as to bind the interests of both adult and minor coparceners in the property, provided that the alienation is made for legal necessity (*x*) [s. 243], or for the benefit of the estate [s. 243A]. A manager (not being the father) can alienate even the share of a minor coparcener to satisfy an antecedent debt of the minor's father (or grand father) when there is no other reasonable course open to him (*y*). It is not necessary to validate the alienation that the

(*t*) *Kishen Parshad* v. *Har Narain Singh* (1911) 33 All. 272, 38 I.C. 45, 9 I. C. 739.

(*u*) (1911) 33 All. 272, 38 I.A. 45, 9 I.C. 739, *supra*.

(*v*) *Kanshi Ram* v. *Lahori Ram* (1939) Lah. 246.

(*w*) *Gajagopi Reddi* v. *Pulla Rami Reddi* (1939) Mad. 530.

(*x*) *Daulat Ram* v. *Mehr Chand* (1887) 14 I.A. 187, 196, 15 Cal. 70; *Sham Sunder* v. *Achhan Kunwar* (1898) 25 I.A. 183, 192, 21 All. 71, 83; *Gharibullah* v. *Khalak Singh* (1903) 25 All. 407, 415-416, 30 I.A. 165-169; *Biswanath* v. *Jagdip* (1913) 40 Cal. 342, 17 I. C. 577; *Hunooman Persaud* v. *Mussumat Bobooee* (1856) 6 M.I. A. 393; *Soorendro* v. *Nundun* (1874) 21 W. R. 196; *Sadhu Saran* v. *Brahmdeo* (1921) 6 Pat. L. J. 256, 61 I. C. 20, (21) A. P. 99 [taking a lease of property for the family].

(*y*) *Dharmarajsingh* v. *Chandrasekhar Rao* (1942) Nag. 214, 200 I.C. 595, ('42) A.N. 66 (F.B.).

S. 242 express consent of the adult members should have been obtained (*z*). See sec. 528 and notes.

In *Suraj Bunsi Koer* v. *Sheo Proshad* (*a*), the Judicial Committee stated that it was not clearly settled whether where an alienation is made by a manager for a legal necessity, but without the express consent of the adult coparceners, the alienation is binding on them. But in later decisions of the same tribunal, the view taken is that if legal necessity is established, the express consent of the adult coparceners is not necessary (*b*).

As to alienation by manager for joint family business, see sec. 246 below.

(*2a*) Where a joint family consists of adults and minors, the mere fact that all the adult members including the manager have consented to the alienation is not proof of legal necessity. Such consent, however, may supply any lacuna that may exist in the evidence of legal necessity (*c*).

(*3*) When an alienation is made by the manager without legal necessity, but with the consent of all other coparceners, they being all adults, the alienation is valid in its entirety (*d*) If it is made without the consent of all, it would, in Bombay and Madras, bind the shares of the consenting members. In Bengal and the United Provinces, where a coparcener cannot alienate even his own interest without the consent of *all* other coparceners, the alienation would not bind the shares either of the alienor or of the consenting members [ss. 257, 258 and ss. 268, 269].

As to consent, see also the undermentioned cases (*e*).

(*4*) An alienation by the manager of a joint family made without legal necessity is not void, but voidable at the option of the other coparceners. They may affirm it or they may repudiate it (*f*), but a creditor cannot repudiate it, there being no suggestion that it was in fraud of creditors (*g*).

(*z*) *Sahu Ram* v. *Bhup Singh* (1917) 44 I A. 126, 130, 39 All. 437, 443, 39 I. C. 280, ('17) A.PC. 61, (1898) 25 I.A. 183, 192, 21 All. 71, 83, *supra*. But see (1903) 30 I.A. 165, 169, 25 All. 407, 415, *supra*. As to Indian decisions, see *Chhotiram* v. *Narayandas* (1887) 11 Bom. 605 [consent presumed]; *Miller* v. *Runganath* (1886) 12 Cal. 389, 399 [express consent not necessary]; *Mudit* v. *Ranglal* (1902) 29 Cal. 797 [express consent not necessary]; *Pratab* v. *Shiam Lal* (1920) 42 All. 264, 265, 55 I. C. 37, ('20) A.A. 131 [express consent not necessary]; *Karm Chand* v. *Ram Labhaya* (1926) 7 Lah. 476, 96 I. C. 443, ('26) A.L. 468.

(*a*) (1879) 6 I. A. 88, 101, 5 Cal. 148, 165.

(*b*) *Sahu Ram* v. *Bhup Sing* (1917) 44 I. A. 126, 130, 39 All. 437, 443, 39 I. C. 280, ('17) A.PC. 61; *Sham Sunder* v. *Achan Kunwar* (1898) 25 I.A. 183, 192, 21 All. 71, 83, *supra*.

(*c*) *Salamut Khan* v. *Bhagwat* (1930) 52 All. 499, 131 I.C. 608, ('30) A. A. 379.

(*d*) *Kandasami* v. *Somaskanda* (1912) 35 Mad. 177, 5 I.C. 922.

(*e*) *Gangabai* v. *Vamanaji* (1864) 2 Bom. H. C. 301; *Miller* v. *Runganath* (1886) 12 Cal. 389.

(*f*) *Subba Goundan* v. *Krishnamachari* (1922) 45 Mad. 449, 68 I.C. 869, ('22) A.M. 112, dissenting from *Kondasami* v. *Somaskanda* (1912) 35 Mad. 177, 5 I. C. 922; *Jagesar* v. *Deo Dat* (1923) 45 All. 654, 74 I.C. 931, ('24) A.A. 51; *Kashinath* v. *Bapurao* (1940) Nag. 573, 191 I. C. 241, ('40) A.N. 305.

(*g*) *Imperial Bank of India* v. *Mt. Maya Devi* (1935) 16 Lah. 714, ('35) A.L. 867.

1. Hunooman Persaud v. Mussammat Babooee (*h*).—The leading case on the subject of alienation for necessity is *Hunooman Persaud's* case. In that case their Lordships of the Privy Council said :— **S. 242**

"The power of the manager for an *infant* heir to charge an estate not his own is under the Hindu law, a limited and qualified power. It can only be exercised rightly *in a case of need*, or *for the benefit of the estate*. But where, in the particular instance, the charge is one that a prudent owner would make, in order to benefit the estate, the *bona fide* lender is not affected by the precedent mismanagement of the estate. *The actual pressure on the estate, the danger to be averted, or the benefit to be conferred upon it*, in the particular instance, is the thing to be regarded . . . Their Lordships think that the lender is bound to inquire into the necessities for the loan, and to satisfy himself as well as he can, with reference to the parties with whom he is dealing, that the manager is acting in the particular instance for the benefit of the estate. But they think that if he does so inquire, and acts honestly, the real existence of an alleged sufficient and reasonably-credited necessity is not a condition precedent to the validity of his charge, and they do not think that, under the circumstances, he is bound to see to the application of the money. . . . The purposes for which a loan is wanted are often future, as respects the actual application, and a lender can rarely have, unless he enters on the management, the means of controlling and rightly directing the actual application. Their Lordships do not think that a *bona fide* creditor should suffer when he has acted honestly and with due caution, but is himself deceived."

The question in *Hunooman Persaud's* case was as to the extent of the power of a mother as manager of the estate of her minor son to alienate the estate. The case related to a mortgage created by the mother, but the same principles apply to a sale (*i*). The principles laid down in that case have been held to apply to alienations—

(a) by the manager of a joint family acting on behalf of minor members of the family (*j*), being the case dealt with in sec. 242 ;

(b) by a Hindu widow and other limited heirs of property inherited by them from males [ss. 178-179] ;

(c) by managers of religious endowments [s. 415] ; and

(d) by managers of the estate of lunatics (*k*).

2. Alienation "for the benefit of the estate."—See sec. 243A.

3. Legal necessity.—See sec. 243.

4. Specific performance of contract of sale entered into by manager.—Where a manager enters into a contract for the sale of immoveable property belonging to the joint family *for a legal necessity*, but subsequently refuses to complete the sale the Court may, in a suit for specific performance brought by the purchaser, decree specific performance of the contract, *though some of the members of the joint family are minors* (*l*).

5. Lease.—The alienation may be one by way of permanent lease (*m*).

See notes to secs. 243 and 244.

(*h*) (1856) 6 M. I. A. 393, 423-424.

(*i*) *Krishna Das* v. *Nathu Ram* (1927) 54 I.A. 79, 84, 49 All. 149, 100 I. C. 130, ('27) A. PC. 37.

(*j*) *Soorendro* v. *Nundun* (1874) 21 W. R. 196 ; *Baboo Kameswar Pershad* v. *Run Bahadur* (1881) 6 Cal. 843, 8 I.A. 8 ; *Sahu Ram* v. *Bhup Singh* (1917) 44 I. A. 126, 130, 39 All. 437, 443, 39 I. C. 280, ('17) A.PC. 61. See also *In re Dattatraya Govind Haldankar* (1932) 56 Bom. 519, ('32) A. B. 537.

(*k*) *Goureenath* v. *Collector of Monghyr* (1867) 7 W. R. 5 ; *Kanti Chunder* v. *Bisheshwar* (1898) 5 Cal. 585.

(*l*) *Hari Charan* v. *Kaula Rai* (1917) 2 Pat. L. J. 513, 40 I.C. 142, ('17) A.P. 478 [F.B.]. As to the liability of a manager for damages for breach of contract where there is no legal necessity, see *Adikesavan* v. *Gurunatha* (1917) 40 Mad. 338, 39 I. C. 358, ('18) A. M. 1315 [F. B.]. See also *Jamsetji* v. *Kashinath* (1902) 26 Bom. 326 ; *Dhapo* v. *Ram Chandra* (1935) 57 All. 375, 154 I. C. 235, ('34) A. A. 1019.

(*m*) *Basdeo* v. *Muhammad* (1929) 51 All. 285, 116 I.C. 491, ('28) A.A. 617.

Ss. 243, 243A

243. What is legal necessity.—The following have been held to be family necessities within the meaning of sec. 242 :—

(a) payment of Government revenue and of debts which are payable out of the family property (*n*);
(b) maintenance of coparceners and of the members of their families (*o*);
(c) marriage expenses of *male* coparceners (*p*), and of the *daughters of* coparceners (*q*);
(d) performance of the necessary funeral or family ceremonies (*r*);
(e) costs of necessary litigation in recovering or preserving the estate (*s*);
(f) costs of defending the head of the joint family (*t*), or any other member (*u*) against a serious criminal charge;
(g) payment or debts incurred for family business or other necessary purpose. In the case of a manager other than a father, it is not enough to show merely that the debt is a pre-existing debt (*v*) [s. 246].

See s. 415, notes under the head "Legal necessity."

243A. Alienation by manager for "the benefit of the estate."—There is a conflict of opinion as to the meaning of the words "for the benefit of the estate" which occur in the judgment of the Judicial Committee in *Hunooman Persaud's* case referred to in note 1 to sec. 242. One view is that a transaction cannot be said to be for the benefit of the estate, unless it is of a defensive character calculated to protect the estate from some threatened danger or destruction (see cases cited in

(*n*) *Gharib-ullah* v. *Khalak Singh* (1903) 25 All. 407, 414-415, 30 I. A. 165; *Mudit* v. *Ranglal* (1902) 29 Cal. 797.

(*o*) See *Makundi* v. *Sarabsukh* (1884) 6 All. 417-421.

(*p*) *Sundrabai* v. *Shivnarayana* (1908) 32 Bom. 81; *Bhagirathi* v. *Jokhu* (1910) 32 All. 575, 6 I.C. 465; *Gopalakrishnam* v. *Venkatarasa* (1914) 37 Mad. 273, 17 I. C. 308, ('14) A.M. 432, overruling *Govindarazalu* v. *Devarabhotla* (1904) 27 Mad. 206; *Kameswara* v. *Veeracharlu* (1916) 34 Mad. 422, 8 I.C. 195.

(*q*) *Chhotiram* v. *Narayandas* (1887) 11 Bom. 605; *Vaikuntam* v. *Kallapiram* (1900) 23 Mad. 512 (marriage of niece); *Vaikuntam* v. *Kallapiram* (1903) 26 Mad. 497; *Ranganaiki* v. *Ramanuja* (1912) 35 Mad. 728, 11 I.C. 570; *Ramcharan* v. *Mihin Lal* (1914) 36 All. 158, 22 I.C. 633, ('14) A.A. 23; *Sellappa* v. *Suppan* (1937) Mad. 906, 171 I.C. 216, ('37) A.M. 496.

(*r*) See *Nathuram* v. *Shoma Chhagan* (1890) 14 Bom. 562; *Lalla Gunpat* v. *Toorun* (1871) 16 W. R. 52.

(*s*) *Miller* v. *Runganath* (1886) 12 Cal. 389.

(*t*) *Beni Ram* v. *Man Singh* (1912) 34 All. 4, 11 I. C. 663; *Ramalingam* v. *Muthayyan* (1914) 26 Mad. L. J. 528, 24 I. C. 356, ('15) A.M. 6; *Hanumat* v. *Sonudhari* (1919) 4 Pat. L. J. 653, 52 I. C. 734, ('20) A.P. 708. But see *Nathu* v. *Dindayal* (1917) 2 Pat. L. J. 166, 39 I. C. 665, ('17) A.P. 504; *Said Ahmed* v. *Raja Barkandi Mahesh Pratap Narain Singh* (1933) 8 Luck. 40, 139 I. C. 64, ('32) A.O. 255 where the next senior member executed the mortgage and it was held to be binding on the family.

(*u*) *Ram Raghubar* v. *Dip Narain* (1923) 45 All. 311, 71 I.C. 749, ('23) A.A. 287; *Dhanukdhari* v. *Rambririch* (1922) 1 Pat. 171, 70 I.C. 391, ('22) A.P. 553.

(*v*) *Chiranji Lal* v. *Bankey Lal* (1933) 55 All. 370, 142 I.C. 333, ('33) A.A. 273.

the note below). Another view is that for a transaction to be for the benefit of the estate it is sufficient if it is such as a prudent owner, or rather a trustee, would have carried out with the knowledge that was available to him at the time of the transaction (*w*). **S. 243A**

Alienation for "the benefit of the estate."—As stated in *Hunooman Persaud*'s case (see note 1 to s. 242), the power of the manager to alienate the estate can only be exercised rightly "*in a case of need* or *for the benefit of the estate.*" Para. 27 of Chapter I of the Mitakshara says that the father has no power to alienate immoveable property without the consent of his sons. To this there is an exception mentioned by Brihaspati which is set forth in para. 28 which is as follows :—

> "An exception to it follows : 'Even a single individual may conclude a donation, mortgage, or sale of immoveable property, *during a season of distress, for the sake of the family*, and especially for pious purposes.'"

The first authoritative exposition of the expression "for the benefit of the estate" is to be found in *Palaniappa* v. *Devasikamony* (*x*). The question in that case was as to the power of a mohunt (head of a math) to alienate debutter land. In the course of the judgment the Judicial Committee observed as follows :—

> "No indication is to be found in any of them as to what is, in his connection the precise nature of the things to be included under the description 'benefit to the estate.' It is impossible, their Lordships think, to give a precise definition of it applicable to all cases, and they do not attempt to do so. The preservation, however, of the estate from extinction, the defence against hostile litigation affecting it, the protection of it or portions from injury or deterioration by inundation, these and such like things would obviously be benefits. The difficulty is to draw the line as to what are, in this connection, to be taken as benefits and what not."

The above passage gave rise to the conflict of opinion noted in the section. In three Allahabad cases the view taken was that a transaction to be for the benefit of the estate must be of a defensive nature. This view was dissented from in a later case by a Full Bench of the Allahabad High Court (*y*). In that case it was held that a transaction to be for the benefit of the estate need not be of a defensive nature, and that the real test was whether the transaction was one which a prudent owner would have carried out with the knowledge then available to him. As to two (*z*) of the three earlier cases, the Full Bench said that the actual decision in those cases was correct on the facts. No opinion was expressed as to the decision in the third case (*a*), where it was held that a mortgage by the manager for starting a *new* business was not binding on the minor members of the family. As to *Palaniappa*'s case the Full Bench observed that though the instances given by their Lordships in that case were all instances where the transaction was of a defensive nature, there was no justification for the suggestion that their Lordships meant to say that the transactions justifiable on the principle of 'benefit to the estate' were limited to transactions which were of a defensive nature.

(*w*) *Jagat Narain* v. *Mathura Das* (1928) 50 All. 969, 116 I.C. 484, ('28) A.A. 454 ; *Tula Ram* v. *Tulshi Ram* (1920) 42 All. 559, 60 I. C. 3, ('20) A. A. 11 ; *Mahabir Prasad* v. *Amla Prasad* (1924) 46 All. 364, 79 I. C. 517, ('24) A. A. 379 ; *Nagindas* v. *Mahomed* (1922) 46 Bom. 312, 64 I. C. 923, ('22) A. B. 122 ; *Ragho* v. *Zaga* (1929) 53 Bom. 419, 118 I.C. 555, ('29) A. B. 251.

(*x*) (1917) 44 I.A. 147, 155, 40 Mad. 709, 718, 39 I.C. 722, ('17) A.PC. 33.

(*y*) *Jagat Narain* v. *Mathura Das* (1928) 50 All. 969, 116 I.C. 484, ('28) A.A. 454.

(*z*) *Bhagwan Das* v. *Mahadeo* (1923) 45 All. 390, 71 I.C. 959, ('23) A.A. 298 ; *Shankar* v. *Bechu* (1925) 47 All. 381, 86 I.C. 769, ('25) A.A. 333.

(*a*) *Inspector Singh* v. *Kharak Singh* (1928) 50 All. 776, 112 I.C. 881, (28) A.A. 403.

S. 243A The expression "in case of need" in the judgment in *Hunooman Persaud's* case may be traced to the words "during a season of distress" in verse 28, and the expression "for the benefit of the estate" to the words "for the sake of the family." The original word for "for the sake of the family" in para. 28 is *kutumbarthe*. As to this word Shah, J., said in a Bombay case (*b*) that it must be interpreted with due regard to the conditions of modern life. In a later case (*c*), Patkar, J., said: "The explanation of the text of Brihaspati by Mitakshara [in v. 29] is by no means to be considered as exhaustive, and may be treated as illustrative and interpreted with due regard to the conditions of modern life."

We now turn to cases decided under the head "benefit to the estate." The manager of a joint family is not entitled to sell joint family land solely for the purpose of so investing the price of its as to bring in an income larger than that derived from the probably safer and certainly more stable property, that is, the land itself. Such a sale is not "for the benefit of the estate" (*d*). A mortgage of family property for the purpose solely of purchasing another property (*e*), or for the payment of premium for a lease of another property (*f*), is not for the benefit of the estate. But a sale of a house in a dilapidated condition, in respect of which a notice has been issued by the Municipality to pull it down, is for the benefit of the estate (*g*). A sale of joint family property which is inconveniently situated and is unproductive, the purchase-money being invested in another property which is a sound investment (*h*), or in family business (*i*), is for the benefit of the estate. A sale of such property will be upheld even if the price was subsequently lost to the family owing to the failure of the bank in which it was invested, provided the intention was to invest the price in another more productive immoveable property which the manager could look after (*j*). Similarly a mortgage of family property for the payment of price for the purchase of a share in a village in which the family already possessed a share is for the benefit of the estate (*k*). A mortgage or sale, however, of family property for the purpose solely of pre-empting another property is not ordinarily for the benefit of the estate (*l*). A deed of exchange executed by a manager of the joint family with a view to defeat a suit for pre-emption, even though made for property of equal value, was held not to bind the other members of the family (*m*). But a mortgage for making additions to and improvements in the family house is for the benefit of the estate (*n*). A mortgage for the purpose of carrying on a speculative litigious suit is obviously not for the benefit of the estate (*o*). Nor is a mortgage for the purpose of repurchasing or acquiring mortgage rights in the estate of

(*b*) *Nagindas* v. *Mahomed* (1922) 46 Bom. 312, 316, 64 I.C. 923, ('22) A.B. 122.

(*c*) *Rogho* v. *Zaga* (1929) 53 Bom. 419, 426, 118 I.C. 555, ('29) A.B. 251.

(*d*) *Palaniappa* v. *Deivasikamony* (1917) 44 I. A. 147, 156, 40 Mad. 709, 719, 39 I.C. 722, ('17) A.PC. 33; *Vishnu* v. *Ramchandra* (1923) 25 Bom. L. R. 508, 73 I.C. 1017, ('23) A.B. 43.

(*e*) *Ram Bilas* v. *Ramyad* (1920) 5 Pat. L.J. 622, 627, 58 I.C. 303, ('20) A.P. 441; *Sellappa* v. *Suppan* (1937) Mad. 906, 171 I.C. 216, ('37) A.M. 496; *Ramkaran Thakur* v. *Baldeo Thakur* (1938) 17 Pat. 168, 173 I.C. 292, ('38) A.P. 44.

(*f*) *Manna Lal* v. *Karu Singh* (1919) 1 Pat. L.T. 6, 39 Cal. L.J. 256, 56 I.C. 766, ('19) A.PC. 108.

(*g*) *Nagindas* v. *Mahomed* (1922) 46 Bom. 312, 64 I.C. 923, ('22) A.B. 122.

(*h*) *Jado Singh* v. *Nathu Singh* (1926) 48 All. 592, 98 I.C. 773, ('26) A.A. 511.

(*i*) *Jugmohan* v. *Prag Ahir* (1925) 47 All. 452, 87 I.C. 27, ('25) A.A. 618.

(*j*) *Jagat Narain* v. *Mathura Das* (1928) 50 All. 969, 116 I.C. 484, ('28) A.A. 454.

(*k*) *Beni Madho* v. *Chunder Prasad* (1924) 3 Pat. 451, 83 I.C. 603, ('25) A.P. 189; *Shaikh Jan* v. *Bikoo* (1928) 7 Pat. 798, 116 I.C. 33, ('29) A.P. 130; *Sitalal* v. *Ajablal Mander* (1939) Pat. 306.

(*l*) *Shankar* v. *Bechu* (1925) 47 All 381, 86 I.C. 769, ('25) A.A. 333; *Kishen Sahai* v. *Raghunath* (1929) 51 All. 473, 116 I.C. 488, ('29) A.A. 139; *Amraj Singh* v. *Shambu Singh* (1933) 55 All. 1, 14 I.C. 509, ('32) A.A. 632; *Brijmohan Lal* v. *Sarabjit Singh* (1938) 13 Luck. 597, 171 I.C. 286, ('37) A.O. 513.

(*m*) *Balzor Singh* v. *Raghunanda Singh* (1932) 54 All. 85, 137 I.C. 191, ('32) A.A. 548.

(*n*) *Ratnam* v. *Govindarajulu* (1878-1881) 2 Mad. 339, 341.

(*o*) *Bhagwan Das* v. *Mahadeo* (1923) 45 All. 390, 71 I.C. 959, ('23) A.A. 298.

a separated brother (*p*). A mortgage by seven adult members of the family for acquiring proprietary interests the consolidation of which had the effect of converting them from mere tenants into landlords is for the benefit of the estate (*q*).

A gift by the manager of a joint family of a small portion of zamindari land purchased by him to a stranger with the object of defeating a claim for pre-emption was held to be a transaction for the benefit of the family and therefore binding on the family (*r*).

It is submitted that a transaction to be binding on the family must be one which not only confers a benefit upon the estate, but is necessary for its good management (*s*).

As to alienations by a widow for the benefit of the estate, see sec. 181B. As to alienations by a natural guardian for the benefit of the estate, see sec. 528.

244. Burden of proof of necessity.—Where the manager of a joint Hindu family sells or mortgages joint family property, the purchaser or mortgagee is bound to inquire into the necessity for the sale or mortgage, and the burden lies on the purchaser or mortgagee to prove *either* that there was a legal necessity in fact, *or* that he made proper and *bona fide* enquiry as to the existence of such necessity and did all that was reasonable to satisfy himself as to the existence of such necessity (*t*).

An intending mortgagee cannot escape the duty of inquiring into the legal necessity for a mortgage so as to bind the minor members of the joint family, by inducing the guardian to apply to the Court for permission to raise a loan on mortgage and thus attempting to throw the responsibility on the Court (*u*). In general, as the power of the manager is a limited power, it is for the mortgagee to show that the transaction was within the authority of the manager (*v*).

The existence of a necessary purpose is not the same as a legal necessity, for, there may be large resources, a large income making a loan unnecessary. The lender must show necessity for the loan (*w*).

If the purchaser or mortgagee proves that there was a legal necessity in fact, the alienation will be upheld, even though the necessity was brought about by the previous mismanagement of the manager, unless it be shown that the purchaser or mortgagee himself contributed to the mismanagement.

Even if he fails to prove that there was a necessity in fact, the alienation will be upheld, if he proves that he made such inquiry as aforesaid.

(*p*) *Hans Raj* v. *Khushal Singh* (1933) 14 Lah. 162, 138 I.C. 642, ('32) A.L. 420.

(*q*) *Baijnath Prasad* v. *Binda Prasad* (1938) 17 Pat. 549, ('39) A.P. 97.

(*r*) *Mohib Ali Khan* v. *Baldeo Prasad* (1939) All. 305.

(*s*) *Hurry Mohun* v. *Ganesh Chunder* (1884) 10 Cal. 823, 830 [F.B.]; *Durgaprasad Barhai* v. *Jewdhari Singh* (1935) 62 Cal. 733.

(*t*) *Kesar Singh* v. *Santokh Singh* (1936) 17 Lah. 824.

(*u*) *In re Dattatreya Govind Haldenkar* (1932) 56 Bom. 519, 141 I.C. 697, ('32) A.B. 537.

(*v*) *Suraj Baksh Singh* v. *Kedar Nath* (1932) 7 Luck. 505, 135 I.C. 379, ('32) A.O. 66.

(*w*) *Ganpat Rao* v. *Ishwar Singh* (1940) Nag. 20, ('38) A.N. 816; *Babu Lal* v. *Satya Narain Prasad* (1941) All. 680, 197, I.C. 509, ('41) A.A. 372.

S. 244 But a purchaser or mortgagee is not bound to see that the money paid or advanced by him is actually applied to meet the necessity. The reason is that he can rarely have the means of controlling and directing the actual application, unless he enters on the management himself (*x*).

"There is no difference between the burden of proof when it is desired to support a mortgage made by a manager of a joint estate, and that which is required to support the mortgage made, for example, by a widow who has only a similar limited power of disposal" (*y*). See s. 182, and the Transfer of Property Act, 1882, s. 38.

Debts for family business.—As to burden of proof, see s. 240 (*3*).

Alienation for purposes of family business.—See sec. 246 below.

Recital of necessity.—Recitals of legal necessity in mortgages or deeds of sale executed by the father or manager are admissible in evidence, but are not of themselves evidence of such a necessity without substantiation by evidence *aliunde* (*z*). They may be corroborated by representation made by the borrower (*a*). But the recitals are admissions of the manager and they also amount to a representation about the need of the family and where owing to the length of time it is impossible to produce other evidence they have evidentiary value also (*b*). (See cases under s. 182).

Lapse of time.—See notes to s. 182 under the same head.

Rate of interest.—Those who support a mortgage of joint family property made by its manager must prove not only that there was necessity to borrow the principal, but that it was not unreasonable to borrow at such rate of interest and upon such terms as are provided by the mortgage (*c*). If the rate of interest is exorbitantly high although the security is ample, the Court can properly infer that it was unnecessarily high, and can make a mortgage decree allowing a reduced rate (*d*). Upon a written statement alleging that there was no legal necessity to execute the document sued on, the defendant, while admitting the necessity to borrow the principal, can contend that the rate of

(*x*) *Anant Ram* v. *Collector of Etah* (1918) 40 All. 171, 44 I.C. 290, ('17) A.PC. 188; *Hunooman Persaud* v. *Mst. Babooee* (1856) 6 M.I.A. 393; *Soorendro* v. *Nundun* (1874) 21 W.R. 196; *Lala Bunseedhur* v. *Bindeseree* (1866) 10 M.I.A. 454, 471; *Dalibai* v. *Gopibai* (1902) 26 Bom. 433; *Kandhia Lal* v. *Muna Bibi* (1898) 20 All. 135; *Muddun Thakoor* v. *Kantoo Lall* (1874) 14 Beng. L.R. 187, 199, 1 I.A. 321, 334; *Tula Ram* v. *Tulshi Ram* (1920) 42 All. 559, 60 I.C. 3, ('20) A.A. 11; *Chintamani* v. *Satyabadi Kar* (1922) 1 Pat. 715, 70 I.C. 226, ('23) A.P. 71; *Baijnath* v. *Gokul* (1923) 45 All. 718, 74 I.C. 498, ('24) A.A. 37; *Radha Ram* v. *Amar Chand* (1923) 4 Lah. 208, 77 I.C. 333, ('23) A.L. 141; *Bed Nath* v. *Rani Rajeshwari Devi* (1938) 13 Luck. 357, 168 I.C. 725, ('37) A.O. 406; *Latta* v. *Avadh Naresh Singh* (1940) 5 Luck. 68, 184 I.C. 443, ('40) A.O. 59.

(*y*) (1918) 40 All. 171, 175, 44 I.C. 290, ('17) A.PC. 188, *supra*.

(*z*) *Biswanath Singh* v. *Kayastha Trading Corporation* (1929) 8 Pat. 450, 119 I.C. 405, ('29) A.P. 422; *Bed Nath Singh* v. *Rani Rajeshwari Devi* (1938) 13 Luck. 357, 168 I.C. 725, ('37) A.O. 406.

(*a*) *Padam Singh* v. *Reoti Saran* ('29) A.A. 481.

(*b*) *Dwaraka Ram* v. *Bakshi Parnaw Prasad* (1935) 14 Pat. 595, 156 I.C. 859, ('35) A.P. 178. See also *Murugesam* v. *Manickavasaka* (1917) 44 I.A. 98.

(*c*) *Jaipal Singh* v. *Lachman Singh* (1934) 9 Luck. 657; *Bajrang Singh* v. *Gobind Prasad* (1936) 11 Luck. 11, 154 I.C. 841, ('35) A.O. 373.

(*d*) *Nazir Begam* v. *Rao Raghunath Singh* (1919) 41 All. 571, 576, 46 I.A. 145, 149, 50 I.C. 434, ('19) A.PC. 12; *Ram Bujhawan Prasad* v. *Nathu Ram* (1923) 50 I.A. 14, 20-21, 2 Pat. 285, 290-291, 71 I.C. 933, ('23) A.PC. 37 [compound interest at 3 per cent. per month payable with quarterly rests, reduced to simple interest at 1 per cent. per month]; *Radha Kishun* v. *Jag Sahu* (1924) 51 I.A. 278, 4 Pat. 19, 80 I.C. 791, ('24) A.PC. 184; *Sunder Mull* v. *Satya Kinker Sahana* (1928) 55 I.A. 85, 7 Pat. 294, 108 I.C. 337, ('28) A.PC. 64 [interest and compound interest at 15 per cent. per annum, rate upheld]: *Raja Hurro Nath* v. *Rundhir Singh* (1891) 18 Cal. 311, 18 I.A. 1; *Nandram* v. *Bhupal Singh* (1912) 34 All. 126, 13 I.C. 5; *Ram Khelawan* v. *Ram Naresh* (1919) 41 All. 609, 51 I.C. 52, ('19) A.A. 268; *Premukhdas* v. *Rambhujawan* (1919) 1 Pat. L.T. 34, 52 I.C. 964, ('20) A.P. 678; *Bikhi* v. *Kodai* (1919) 41 All. 523, 50 I.C. 814, ('19) A.A. 238; *Mahadeo* v. *Bissessar* (1923) 2 Pat. 488, 74 I.C. 695, ('24) A.P. 71; *Parmeshwar* v. *Raj Kishore* (1924) 3 Pat. 829, 80 I.C. 34, ('25) A.P. 59; *Sukh Lal* v. *Murari Lal* (1926) 1 Luck. 160, 95 I.C. 1019, ('26) A.O. 273; *Durgaprasad* v. *Jewdhari Singh* (1935) 62 Cal. 733 where 18 per cent. compound interest with nine monthly rests was reduced to 18 per cent. simple interest.

interest was unnecessarily high. A plea of no legal necessity for a loan in the written statement opens the door for a defendant to say that the rate of interest is excessive though there is no specific plea in the written statement that there was no necessity to borrow at so high a rate of interest (*e*). The same rules apply to a mortgage by a Hindu widow or other limited owner of property inherited by her from the last full owner (*f*).

In two cases the Judicial Committee laid down that the authority of a manager to borrow in a case of necessity was one to borrow "upon reasonable commercial rates" (*g*). This expression means, as their Lordships observed in a later case, such terms as can be arranged freely between borrower and lender in the circumstances of the particular case; no reference to the current rate of interest upon mercantile transactions is to be understood, especially if the parties belong to a community which is not a commercial community and the transaction is one which no one would call mercantile. In the same case it was held that a previous borrowing upon terms as onerous as those in question may be evidence that those terms are reasonable and proper (*h*).

In Oudh 12 per cent. per annum is looked upon as a normal rate of interest even where the security is abundant (*i*).

245. Purchase-money or money raised on Mortgage applied by manager in part only to purposes of legal necessity.—(*1*) *Sale.*—Cases frequently arise in which joint family property is sold by the manager of the family for legal necessity, but the whole of the price is not proved to have been *applied* to purposes of necessity, and the sale is challenged on that ground by the other members of the family. In such cases, if the sale itself is justified by legal necessity, and the purchaser pays a fair price for the property sold, and acts in good faith and after due inquiry as to the necessity for the sale, the mere fact that part of the price is not proved to have been *applied* to purposes of necessity would not invalidate the sale, the purchaser not being bound to see to the *application* of the price. If the above conditions are satisfied, the sale must be upheld unconditionally, whether the part not proved to have been applied to purposes of necessity is considerable or not (*j*). See s. 189.

(*e*) *Ram Bujhawan Prasad* v. *Nathu Ram* (1923) 50 I.A. 14, 22, 2 Pat. 285, 287, 71 I.C. 933, ('23) A.PC. 37; *Radhakishun* v. *Jag Sahu* (1924) 51 I.A. 278, 4 Pat. 19, 80 I.C. 791, ('24) A.PC. 184.

(*f*) *Radha Kishun* v. *Jag Sahu* (1924) 51 I.A. 278, 4 Pat. 19, 80 I.C. 791, ('24) A.PC. 184; *Ram Dayal* v. *Amin Uddin* (1931) 29 All. L.J. 29, 133 I.C. 311, ('31) A.A. 203.

(*g*) *Nazir Begum* v. *Rao Raghunath Singh* (1919) 41 All. 571, 576, 46 I.A. 145, 149, 50 I.C. 434, ('19) A.PC. 12; (1924) 51 I.A. 278, 4 Pat. 19, 80 I.C. 791, ('24) A.PC. 184, *supra*.

(*h*) *Sunder Mull* v. *Satya Kinker Sahana* (1928) 55 I.A. 85, 7 Pat. 294, 108 I.C. 337, ('28) A.PC. 64.

(*i*) *Suraj Baksh Singh* v. *Kedar Nath* (1932) 7 Luck. 505, 135 I.C. 379, ('32) A.O. 66.

(*j*) *Krishna Das* v. *Nathu Ram* (1927) 54 I.A. 79, 49 All. 149, 100 I.C. 130, ('27) A.PC. 37 [price Rs. 3,500—Rs. 500 not proved to have been applied to purposes of necessity—sale upheld unconditionally]; *Niamat Rai* v. *Din Dayal* (1927) 54 I.A. 211, 8 Lah. 597, 101 I.C. 373, ('27) A.PC. 121 [sale upheld unconditionally]: *Masit Ullah* v. *Damodar Prasad* (1926) 53 I.A. 204, 48 All. 518, 98 I.C. 1031, ('26) A. PC. 105 [price Rs. 18,400—Rs. 2,000 not proved to have been applied to purposes of necessity—sale upheld unconditionally]; *Gauri Shankar* v. *Jiwan Singh* (1928) 30 Bom. L.R. 64, 107 I.C. 4, ('27) A.PC. 246 [price Rs. 4,000—Rs. 500 not applied to purposes of necessity—sale upheld unconditionally]; *Shyam Lal* v. *Badri Prasad* (1929) 51 All. 1039, 122 I.C. 744, ('29) A. A. 789; *Ram Sunder* v. *Lacchmi* (1929) 51 All. 430, 160 I.C. 605, ('29) A.PC. 143 [price Rs. 10,767—Rs. 3,033 not proved to have been applied to purposes of necessity—sale upheld unconditionally]; *Achutanand* v. *Surjanarain* (1926) 5 Pat. 746, 95 I.C. 991, ('26) A.P. 427 [price Rs. 750—Rs. 200 not proved to have been applied, etc.—sale upheld unconditionally]; *Suraj Bhan Singh* v. *Sah Chain Sukh* (1927) 29 Bom. L.R. 1385 [P.C.], 105 I.C. 257, ('27) A. PC. 244 [sale by widow]; *Murbi* v. *Ghammar* (1929) 51 All. 61, 121 I.C. 285, ('30) A.A. 22; *Johnston* v. *Gopal Singh* (1931) 12 Lah. 546, 133 I.C. 628, ('31) A.L. 419.

S. 245 In an Allahabad case (*k*), where the sale was for Rs. 6,000 which was a fair price but the amount proved to have been applied for purposes of legal necessity was only Rs. 3,281, and there was *no evidence of any inquiry* having been made by the purchaser as to the necessity for the loan, it was held that the sale itself was not one which was justified by legal necessity, and that it should be set aside conditionally on payment by the plaintiffs of Rs. 3,281 to the purchaser.

A contract of sale may be justified by legal necessity, as where it is made for payment of a previous mortgage debt. But it may be improvident and therefore beyond the powers of the manager, as where he has entered into a previous agreement for a sale of part of the property and is therefore unable to complete the sale, and the purchaser is thereby placed in a position indefinitely to postpone completion of the purchase and payment of the price, so that the contract may be of no value to relieve the financial necessity existing at its date. In such a case, if the sale is completed at a time when it is deprived of all value as a solvent of the family's financial difficulties the sale should be set aside, but if the purchase money has been applied by the manager in payment of the mortgage debt, the purchaser should have the full benefit of the mortgage. An example of the commonest kind where the sale would be deprived of all value as a solvent of the family's financial difficulties would be where the price at which the property is agreed to be sold is Rs. 22,500, and the mortgage debt at the date of the contract of sale is Rs. 14,000, but the sale is completed after several years, and the mortgage debt at the date of sale has augmented to a sum equivalent almost to the price of the property, so that at the date of the completion of the sale hardly any surplus is left to the vendor (*l*).

(*2*) *Mortgage.*—It has been held in Oudh that the rule stated in sub-sec. (*1*) applies only to sales, and not to mortgages. The reason given is that it is not always possible for the father [or manager] of a family to sell that share of the property which will bring in the precise sum which is wanted to clear the debts which are binding, while in the case of a mortgage he can borrow the precise amount required to meet the family necessity. The mortgage therefore can be redeemed on payment to the mortgagee of such sum only as was required for legal necessity (*m*). The decision has been followed by

(*k*) *Sri Nath* v. *Jagannath* (1931) 52 All. 391, 126 I.C. 230, ('30) A.A. 202. See also *Lachman Prasad* v. *Sarnam Singh* (1917) 39 All. 500, 44 I.A. 163, 40 I.C. 284, ('17) A.PC. 41 [mortgage].

(*l*) *Ram Charan* v. *Bhagwandas* (1926) 53 I.A. 142, 48 All. 443, 95 I.C. 898, ('25) A.PC. 68.

(*m*) *Thakur Jai Indra* v. *Lala Khairati Lal* (1929) 4 Luck. 107, 113 I.C. 489, ('28) A.O. 465.

the High Court of Patna (*n*). In a case where the mortgage was for Rs. 12,000 and it was found that there was justifiable necessity only for Rs. 7,700, the Calcutta High Court held that there was no *bona fide* inquiry and granted a decree only for the latter sum with the corresponding interest, at the same time observing that it was not necessary to express any opinion on the question discussed above (*o*). **S. 245**

Illustrations of sub-sec. (1).

(a) A joint Hindu family consists of a father and his minor sons. The father sells one of the joint family properties for Rs. 3,500 out of which Rs. 3,000 are paid to the creditors of the family. Afterwards the sons sue to set aside the sale on the ground that the surplus of Rs. 500 was not applied to purposes of necessity: It is proved that the price was adequate and that the purchaser had made due inquiry as to the necessity for the sale. The mere fact that the surplus is not proved to have been applied to purposes of necessity is not a sufficient ground in law for setting aside the sale: *Krishn Das* v. *Nathu Ram* (1927) 54 I. A. 79, 49 All. 149, 100 I. C. 130, ('27) A.PC. 37. [In this case, the High Court of Allahabad held that the surplus of Rs. 500 was a "considerable" part of the whole price, and passed a decree setting aside the sale conditionally upon the sons paying Rs. 3,000 to the purchaser, but the decree of the High Court was reversed on appeal by the Judicial Committee.]

(b) A Hindu widow sold immoveable property inherited by her from her husband for Rs. 2,142. The whole of the price except Rs. 105 was applied to purposes of necessity. In a suit by the reversioners to set aside the sale, the High Court of Allahabad held that the amount not proved to have been applied to purposes of necessity being a "small" one, the sale should be upheld, but the Court directed the purchaser to repay to the plaintiffs the sum of Rs. 105 [*Daulat* v. *Saukhata* (1925) 47 All. 355, 86 I. C. 91, ('25) A. A. 324]. This decision was disapproved by the Judicial Committee in the case cited in ill. (a) as being opposed both to principle and authority.

The leading case on the subject is *Krishn Das* v. *Nathu Ram* (1927) 54 I. A. 79, 49 All. 149, 100 I. C. 130, ('27) A.PC. 37. Prior to the decision in that case it was held by the High Court of Allahabad (1) that if the portion of the price not proved to have been applied to purposes of legal necessity was *considerable*, the Court should pass a conditional decree setting aside the sale on payment by the plaintiffs [that is, the coparceners challenging the sale] to the purchaser of the sum which was found to have been applied for purposes of necessity (*p*); (2) that if such portion was *small*, the Court should pass a conditional decree upholding the sale on repayment by the purchaser of such portion (*q*); and (3) that if such portion was a *trifling* sum, the Court should uphold the sale without imposing any condition upon the purchaser (*r*). These decisions were disapproved by the Judicial

(*n*) *Dwaraka Ram* v. *Bakshi Parnaw Prasad* (1935) 14 Pat. 595, 156 I.C. 859, ('35) A.P. 178, distinguishing *Hitendra* v. *Sukhdev* (1929) 8 Pat. 558, 115 I.C. 886, ('29) A.P. 360.

(*o*) *Durga Prasad Borbai* v. *Jewdhari Singh* (1935) 62 Cal. 733, 161 I. C. 595, ('36) A.C. 116.

(*p*) *Gobind Singh* v. *Baldeo Singh* (1903) 25 All. 330 [sale by widow—price Rs. 3,299—Rs. 376 not proved to have been applied to purposes of necessity]; *Ram Devi* v. *Abu Jafar* (1905) 27 All. 494 [sale by widow—price Rs. 2,995—Rs. 445 not proved, etc.]; *Jainarayan* v. *Bhagwan* (1922) 44 All. 683, 80 I. C. 1006, ('22) A A 321 [price Rs. 375—Rs. 101 not proved, etc.]; *Dwarka Ram* v. *Jhulai* (1923) 45 All. 429, 431, 72 I. C. 134, ('23) A. A. 248 [price Rs. 600—Rs. 200 not proved, etc.].

(*q*) *Daulat* v. *Sankhata* (1925) 47 All. 355, 86 I.C. 91, ('25) A. A. 324 [price Rs. 2,142—Rs. 105 not proved to have been applied to purposes of necessity].

(*r*) *Lal Bahadur* v. *Kamleshar* (1926) 48 All. 183, 90 I. C. 988, ('25) A. A. 624 (F.B.) [price Rs. 5,995—Rs. 259 not proved to have been applied to purposes of necessity.]

S. 245 Committee in an appeal from Allahabad, and it was held that a sale of joint family property should not be set aside merely because a *considerable* part of the purchase money is not proved to have been applied to purposes of legal necessity. The real question to be considered is whether the sale itself was justified by legal necessity; if the purchaser has acted honestly and made due inquiry as to the existence of necessity for the sale, he is not bound to account for the application of the price. If the above conditions are fulfilled the sale must be upheld. It was also held that on the same principle a decree upholding a sale conditionally upon the purchaser paying a *small* part of the price not proved to have been applied to purposes of necessity is also contrary to law; the sale must be upheld unconditionally.

In *Krishn Das* v. *Nathu Ram* (*s*), the Judicial Committee adopted the principles laid down by the same tribunal in 1856 in *Hanooman Persaud* v. *Musummat Babooee* (*t*). The material portions of the judgment in *Hanooman Persaud's* case have been set out in the notes to s. 242 above. That case related to a mortgage created by a mother of property belonging to her minor son as his natural guardian. Ever since the decision in that case the principles laid down in that case have been applied to sales and mortgages of joint family property effected by the manager of the family and to sales and mortgages by a Hindu widow of property inherited by her from her husband. Almost all the cases cited by the Judicial Committee in *Krishn Das* v. *Nathu Ram*, as supporting their decision, were cases of sales by a Hindu widow. The point emphasized in both the cases was that the validity of a sale in such cases did not depend upon proof of the *application* of the price. The reason is that a *bona fide* purchaser for value is not bound to see to the application of the price paid by him; if it were otherwise, he would himself have to enter on the management and direct and control the actual application of the money. Hence it has been held that the mere fact that a considerable part of the price, *e.g.*, Rs. 712 out of Rs. 5,300 (*u*), or Rs. 2,000 out of Rs. 18,400 (*v*), or Rs. 5,100 out of Rs. 43,500 (*w*), or even one-third of the whole price (*x*), is not proved to have been applied to purposes of necessity, is not a sufficient ground in law for setting aside the sale. In the course of the judgment in *Krishn Das* v. *Nathu Ram*, their Lordships of the Privy Council observed as follows:—

"It would rather appear that in any case where the sale has been held to be justified but there is no evidence as to the application of a portion of the consideration, a presumption arises that it has been expended for proper purposes, and for the benefit of the family. This is in line with the series of decisions already referred to, in which it was held that where the purchaser acts in good faith and after due inquiry, and is able to show that the sale itself was justified by legal necessity, he is under no obligation to inquire into the application of any surplus and is, therefore, not bound to make repayment of such surplus to the members of the family challenging the sale."

The decision in *Krishn Das* v. *Nathu Ram* was followed by the same tribunal in *Niamat Rai* v. *Din Dayal* (*y*). In that case the managing member of a joint Hindu family sold part of the joint property for Rs. 43,500, which was the full value. Out of the price Rs. 38,400 was applied to discharge debts incurred in carrying on a business to which the joint family had succeeded and the balance was invested in that business. Two minor members of the family sued to set aside the sale on the ground that the surplus of Rs. 5,100 was not applied to purposes of necessity. It was held that even if there had been no joint family business, proof that pre-existing debts to the amount of Rs. 38,400

(*s*) (1927) 54 I.A. 79, 49 All. 149, 100 I.C. 130, ('27) A.PC. 37.
(*t*) (1856) 6 M. I. A. 393, 423-424.
(*u*) *Medai Dalavoi* v. *Nainar Taran* (1922) 27 C. W. N. 365, 74 I. C. 604, ('22) A.PC. 307.
(*v*) *Masit Ullah* v. *Damodar Prasad* (1926) 53 I. A. 204, 48 All. 518, 98 I. C. 1031, ('24) A.PC. 105.
(*w*) *Niamat Rai* v. *Din Dayal* (1927) 54 I.A. 211, 8 Lah. 597, 101 I.C. 373, ('27) A.PC. 121.
(*x*) *Ram Gopal Ghose* v. *Bullodeh Bose* (1864) W. R. 385.
(*y*) 54 I.A. 211, 8 Lah. 597, 101 I. C. 373, ('27) A.PC. 121, *supra*.

had been satisfied out of the price, would support the sale, without showing how the balance had been applied. See s. 189 and notes. Ss. 245, 246

246. Alienation by manager of coparcenary property for purposes of family business.—The power of a manager to carry on a family business necessarily implies a power to mortgage or sell the family property for a legitimate and proper purpose of the business. An alienation so made is binding on the family property, including the interest of minor coparceners therein (*z*). Further, the manager has authority to raise money not only to discharge debts arising out of the family business, but also money needed to carry it on. It is a matter for his decision whether the money necessary should be raised by mortgage or by a sale, and whether it was better to raise money to continue a business which latterly had not been profitable, or to close it down; it would be unreasonable to expect a lender or purchaser to investigate questions of that kind (*a*). If the lender or purchaser acted honestly and with due caution, and made reasonable inquiries which led him to believe that a sufficient and real necessity for the raising of the money for the purposes of the family business did exist (*b*), nor is he bound to see to the application of the money (*c*). Where the alienation was made by a manager who was blind and deaf and practically all the money which had been disallowed by the High Court had been borrowed by the fourth and fifth defendants, who were the eldest members of the family and the manager's right-hand men, their conduct in not giving evidence and remaining as defendants, while causing their sons to file the suit questioning the alienation, was held by their Lordships of the Privy Council to be strong corroborative evidence of legal necessity (*d*).

A mortgage by the manager for enlarging a family business by the purchase of fresh stock is binding on the family property including the interest of the minor coparceners therein, provided the transaction is one which a prudent owner would enter into having regard to all the circumstances of the case (*e*).

(*z*) *Ram Krishna* v. *Ratan Chand* (1931) 58 I.A. 173, 53 All. 190, 132 I. C. 613, ('31) A. PC. 136; *Ramlal* v. *Lakhmichand* (1861) 1 Bom. H. C. App. 11; *Sham Sundar* v. *Achhan Kunwar* (1899) 21 All. 71, 83, 25 I. A. 183, 192; *Khem Chand* v. *Narain Das* (1925) 6 Lah. 493, 89 I. C. 1022, ('26) A. L. 41; *Mahabir Prasad* v. *Amla Prasad* (1924) 46 All. 364, 79 I.C. 517, ('24) A. A. 379; *Narayanan* v. *Muthiah* (1924) 47 Mad. 692, 80 I. C. 654, ('24) A. M. 680.

(*a*) *Niamat Rai* v. *Din Dayal* (1927) 54 I.A. 211, 8 Lah. 597, 101 I.C. 373, ('27) A.PC. 121.

(*b*) *Ram Nath* v. *Chiranji Lal* (1935) 57 All. 605 (F.B.) 155 I.C. 136, ('35) A.A. 221.

(*c*) *Ramkrishna* v. *Ratan Chand* (1931) 58 I.A. 173, 53 All. 190, 132 I.C. 613, ('31) A.PC. 136.

(*d*) *Jagannath* v. *Shri Nath* (1934) 56 All. 123, 61 I.A. 150, 147 I.C. 903, ('34) A.PC. 85.

(*e*) *Raj Kumar* v. *Mohan Lal* (1931) 29 All. L. J. 219, 131 I.C. 872, ('31) A.A. 253.

Ss. 246-249

A manager in executing a mortgage for a legal necessity may, under section 69, Transfer of Property Act, confer, on the mortgagee, the right of sale without recourse to the court (*f*).

As to new business, see s. 234 (2).

247. Reference to arbitration by manager.—A father (*g*) or other manager has power to refer to arbitration disputes relating to joint family property provided such reference is for the benefit of the family. The other members of the family including minors are bound by the reference and by the award made upon it (*h*).

The reference may be in respect of disputes between the family and an outsider, or disputes between members of the family themselves, *e.g.*, as to shares on partition.

248. Compromise by manager.—A compromise entered into by the manager *bona fide* for the benefit of the family, binds the other members of the family including minors (*i*).

But where a suit relating to joint family property, to which a father and his minor sons are parties, is pending and the father himself is the next friend or guardian *ad litem* of the minors, his powers are controlled by the provisions of O. 32, r. 7, of the Code of Civil Procedure, 1908, and he is debarred from entering into any compromise relating to the joint family property without leave of the Court. The minors are not bound in such a case either by the compromise or by a consent decree in terms of the compromise (*j*). The Court may in such a case set aside the whole compromise (*k*). A manager of a joint family is subject to O. 33, rr. 6 & 7, of Civil Procedure Code (*l*).

248A. Manager's power to give valid discharge for debts.—The manager has power to give a valid discharge for a debt due to the joint family. Hence if one of the members is a minor, he cannot claim the benefit of sec. 7 of the Limitation Act (*m*).

249. Acknowledgment and part payment of debt by manager.—It is competent to a manager to acknowledge a debt, or to

(*f*) *Paramanand Dass Chota Dass & Sons* v. *Mannulal Kanji & Ors.* (1942) Mad. 287, 201 I.C. 62, ('42) A.M. 232 (1941).

(*g*) *Shantilal* v. *Munshilal* (1932) 56 Bom. 595. 139 I.C. 820, ('32) A.B. 498.

(*h*) *Jagan Nath* v. *Manu Lal* (1894) 16 All. 231; *Balaji* v. *Nana* (1903) 27 Bom. 287; *Dwarkadas* v. *Krishan* (1921) 2 Lah. 114, 121-124, 61 I.C. 628, ('21) A.L. 34; *Guran Ditta* v. *Pokar Ram* (1927) 8 Lah. 693, 104 I.C. 202, ('27) A.L. 362; *Nanak Chand* v. *Banarsi Das* (1931) 12 Lah. 65, 126 I.C. 579, ('30) A.L. 425; *Kaushi Ram* v. *Harnam Das* (1940) 21 Lah. 599, 188 I.C. 493, ('40) A.L. 73.

(*i*) *Pitam Singh* v. *Ujagar Singh* (1878) 1. All. 651; *Dwarkadas* v. *Krishan* (1921) 2 Lah. 114, 123-124, 61 I.C. 628, ('21) A.L. 34; *Dangal Ram* v. *Jaimangal* (1926) 5 Pat. 480, 95 I.C. 1051, ('26) A.P. 361; *Bhagwan Singh* v. *Behari Lal* (1938) Nag. 221, 172 I.C. 43, ('37) A.N. 237.

(*j*) *Ganesha Row* v. *Tuljaram Row* (1913) 40 I.A. 132, 36 Mad. 295, 19 I.C. 515.

(*k*) *Venkata Row* v. *Tuljaram Row* (1922) 49 I.A. 91, 45 Mad. 298, 74 I.C. 765, ('22) A.PC. 69 [continuation of litigation in 40 I.A. 132, 19 I.C. 515, *supra*].

(*l*) *Fatmabai* v. *Tukabai* (1945) Nag. 242.

(*m*) *Rati Ram* v. *Niadar* (1919) 41 All. 435, 49 I.C. 990, ('19) A.A. 209; *Babu* v. *Bala* (1921) 45 Bom. 446, 59 I.C. 759, ('21) A.B. 289; *Supdu* v. *Sakharam* (1928) 52 Bom. 441, 110 I.C. 276, ('29) A.B. 13; *Varada Bhaktaratsaludu & Ors.* v. *Damoji Purapu Venkat Narasimha Rao & Ors.* (1940) Mad. 752, 191 I.C. 369, ('40) A.M. 530.

pay interest on a debt, or to make part payment of a debt, so as to extend the period of limitation, but he has no power to pass a promissory note so as to revive a debt barred by the law of limitation (*n*). But he can renew a note, the time for filing a suit on which expired during the summer recess of a court and the suit could therefore be filed on the reopening day (*o*).

A manager or a member cannot keep a debt alive against the other members of the family by making payments after partition (*p*).

Indian Limitation (Amendment) Act 1 *of* 1927.—It is now expressly provided by the Indian Limitation (Amendment) Act 1 of 1927 that for the purposes of secs. 19 and 20 of the Indian Limitation Act, 1908, where a liability has been incurred by, or on behalf of a Hindu undivided family as such, an acknowledgment or payment made by, or by the duly authorized agent of, the manager of the family for the time being shall be deemed to have been made on behalf of the whole family. Sec. 19 of the Limitation Act, 1908, deals with acknowledgments, and sec. 20 with payment of interest as such on a debt and with part payment of principal. The portion of the Amending Act set out above is an addition to sec. 21 of the principal Act, the additional portion being sub-sec. (3) (b). The Amending Act is set out in Appendix IV below.

Revival of time-barred debt.—As to revival of a time-barred debt by passing a promissory note, see the Indian Contract Act, 1872, s. 25 (3). If the manager revives a time-barred debt by passing a promissory note, he alone is liable on the note (*q*).

Admissions by father.—"In the case of a Mitakshara father who is the karta, an implied authority to make an admission for the benefit of his minor sons may very well be presumed" (*r*).

250. Relinquishment of debt by manager. The manager has no power to give up a debt due to the joint family (*s*).

251. Parties to suits. (*1*) Where the manager of a joint family, having power to do so, enters into a transaction *in his own name* on behalf of the family, whether it be a contract (*t*),

(*n*) *Bhasker* v. *Vijalal* (1893) 17 Bom. 512; *Dinkar Appaji* (1896) 20 Bom. 155; *Chinnaya* v. *Gurunatham* (1882) 5 Mad. 169; *Dalip Singh* v. *Kundan Lal* (1913) 35 All. 207, 18 I.C. 726; *Sadhu Saran* v. *Brahmdeo* (1921) 6 Pat. L.J. 256, 260-261, 61 I.C. 20, ('21) A.P. 299; *Thakar Das* v. *Mst. Putli* (1924) 5 Lah. 317, 82 I.C. 96, ('24) A.L. 611.

(*o*) *Subba Reddi* v. *Venkataramayya* (1945) Mad. 634.

(*p*) *Pangudaya* v. *Uddandiya* (1938) Mad. 968, 177 I.C. 188, ('38) A.M. 774; *Rangaswami Ayyangar* v. *Sivaprakasam Pillai & Ors.* (1942) Mad. 251, 198 I.C. 177, ('41) A.M. 925.

(*q*) *Thakar Das* v. *Mst. Putli* (1924) 5 Lah. 317, 82 I.C. 96, ('24) A.L. 611.

(*r*) *Surendra Nath* v. *Sambhunath* (1928) 55 Cal. 210, 218, 104 I.C. 219, ('27) A.C. 870.

(*s*) *Dasaratharama* v. *Naraha* (1928) 51 Mad. 484, 109 I.C. 329, ('28) A.M. 601.

(*t*) *Kishen Parshad* v. *Har Narain Singh* (1911) 38 I.A. 45, 33 All. 272, 9 I.C. 739, reversing 29 All. 311 [money lending transaction]; *Ramnath* v. *Ramrao* (1922) 46 Bom. 358, 64 I.C. 960, ('22) A.B. 281 [promissory note]; *Gangaram* v. *Bapusaheb* (1922) 46 Bom. 1022, 84 I.C. 508, ('22) A.B. 354 [rent-note]; *Jagabhai* v. *Rustamji* (1885) 9 Bom. 311 [partnership agreement between manager and stranger to family]; *Anant Ram* v. *Channu Lall* (1903) 25 All. 378 [partnership agreement between manager and stranger to family]; *Gopal Das* v. *Badri Nath* (1905) 27 All. 361 [goods sold and delivered]; *Durga Prasad* v *Damodar Das* (1910) 32 All. 183, 5 I.C. 767 [purchase of silver bars]; *Ram Kishan* v. *Ganga Ram* (1931) 12 Lah. 428, 133 I.C. 116, ('31) A.L. 559. The decisions to the contrary in *Seshan* v. *Veera* (1909) 32 Mad. 284, 4 I.C. 38 [account stated], and *Shamrathi* v. *Kishen* (1907) 29 All. 311, 314 [account stated], are no longer good law. The decision in *Alagappa* v. *Vellian Chetti* (1895) 18 Mad. 33 (contract of employment], may be supported on the ground that the single plaintiff in that suit was not shown to be the manager—see 38 I.A. 45, 53, 33 All. 272, 278, 9 I.C. 739.

S. 251 or a mortgage (*u*), or a sale (*v*), he may sue or be sued alone in respect of that transaction. Where the mortgage by the manager extends to the entire interest of the family and is not confined to the manager's share he must be deemed to have acted in the transaction on behalf of the family (*w*). The other coparceners are not necessary parties to a suit on such a mortgage, as they are effectually represented by him (*x*) and are bound by the decree in the suit (*y*). But a member who contends that the action of the manager was beyond his powers is not properly represented by the manager and ought to be joined as a party if he wishes (*z*).

The above proposition is based upon two decisions of the Privy Council set out in illustrations (1) and (2) below.

Illustrations.

(1) *A* and *B* are managers of a joint family which carries on the business of money-lenders. As such managers they advance moneys belonging to the joint family to *C*. *A* and *B* are entitled to sue *C* on an acknowledgment passed to them by *C* in respect of the money dealings. The other coparceners are not necessary parties to the suit. Accordingly the joinder of the other coparceners as plaintiffs after the statutory period has expired, being unnecessary, does not prevent the suit as originally constituted from being in time: *Kishen Parshad* v. *Har Narain Singh* (1911) 38 I. A. 45, 33 All. 272, 9 I. C. 739. But after partition the position of the members is that of partners and all must sue (*a*).

(2) *M* mortgages two immoveable properties to *J*. He then borrows moneys from *H* and *D*, the managing members of a joint Hindu family, and executes a *second mortgage* of one of the properties to them. He also sells the equity of redemption of the other property to *H* and *D*, and executes a *sale-deed* in their favour. *J* sues *M*, *H* and *D* on his mortgage, and obtains a foreclosure decree against them. The other members of the joint family are not parties to the suit. *H* and *D* do not avail themselves of the right to redeem, and the decree is made absolute. The decree is binding on the other members of the family, and they are not entitled to sue *J* for redemption: *Sheo Shankar* v. *Jaddo Kunwar* (1914) 41 I. A. 216, 220, 36 All. 383, 24 I. C. 504, ('14) A.PC. 136. In the course of the judgment their Lordships of the Privy Council said:—

(*u*) *Sheo Shankar* v. *Jaddo Kunwar* (1914) 41 I.A. 216, 220, 36 All. 383, 386-387, 24 I.C. 501, ('14) A.PC. 136 affirmg. 33 All. 71, 7 I.C. 902 [a case under Transfer of Property Act, s. 85], *Hari Lal* v. *Munman Kunwar* (1912) 34 All. 519, 15 I.C. 126 [a case under C.P.C., O. 34, r. 1]; *Madan Lal* v. *Kishan Singh* (1912) 34 All. 572, 15 I.C. 138 [ditto]; *Ram Krishna* v. *Vinayak* (1910) 34 Bom. 354, 5 I.C. 967 [Transfer of Property Act, s. 85]; *Chimna* v. *Sada* (1910) 12 Bom. L.R. 811, 7 I.C. 990 [ditto]; *Sheikh Ibrahim* v. *Rama Iyer* (1912) 35 Mad. 685, 5 I.C. 967; *Raghunandan* v. *Parmeshwar* (1917) 2 Pat. L.J. 306, 39 I.C. 779, ('17) A.P. 375 [a case under C.P.C., O. 34, r. 1]; *Jag Sah* v. *Ram Chandra* (1921) 6 Pat. L.J. 640, 63 I.C. 564, ('21) A.P. 377 [ditto]; *Sheikh Abdul* v. *Shiv Lal* (1921) 6 Pat. L. J. 650, 63 I.C. 570, ('22) A.P. 252; *Bungse* v. *Soodist Lall* (1882) 7 Cal. 739; *Ramayya* v. *Venkataratnam* (1894) 17 Mad. 122; *Pirthipal* v. *Rameshwar* (1927) 2 Luck. 288, 99 I.C. 154, ('27) A.O. 27 [foreclosure suit—O. 34, r. 1]; *Madhusudan* v. *Bhagwan* (1929) 53 Bom. 444, 118 I.C. 788, ('29) A.B. 213. The decisions to the contrary in *Debi Prasad* v. *Dharamjit* (1914) 41 Cal. 727, 22 I.C. 570, ('14) A.C. 455, and *Ramchandra* v. *Shripatrao* (1916) 40 Bom. 248, 33 I.C. 771, ('16) A.B. 278, can no longer be upheld.

(*v*) (1914) 41 I.A. 216, 36 All. 383, 24 I.C. 504, ('14) A.PC. 136, *supra* [purchase of equity of redemption], *supra*.

(*w*) *Daulat Ram* v. *Mherchand* (1888) 15 Cal. 70, 14 I.A. 187; *Ramanathan Chettiar* v. *S. Rm. M. Ct. M. Firm* (1937) Mad. 376, 168 I.C. 731, ('37) A.M. 345.

(*x*) *Venkatanarayana* v. *Somraju* (1937) Mad. 880 (F.B.), 171 I.C. 101, ('37) A.M. 610.

(*y*) *Ramnathan Chettiar* v. *S. Rm. M. Ct. M. Firm* (1937) Mad. 376, 168 I.C. 731, ('37) A.M. 345; *Bhagwan Singh* v. *Beharilal* (1938) Nag. 221, 172 I.C. 43, ('37) A.N. 237.

(*z*) *Motiram* v. *Lalchand* (1937) Nag. 362, 172 I.C. 192, ('37) A.N. 121.

(*a*) *Bihari Lal* v. *Pt. Ramchandra Sharma* (1942) 17 Luck. 702, 200 I.C. ('42) A.O. 335.

"There seems to be no doubt upon the Indian decisions (from which their Lordships see no reason to dissent) that there are occasions *including foreclosure suits* when the managers of a joint Hindu family so effectively represent all other members of the family that the family as a whole is bound. It is quite clear from the facts of this case and the findings of the Courts upon them that this is a case where this principle ought to be applied. There is not the slightest ground for suggesting that the managers of the joint family did not act in every way in the interests of the family itself." **S. 251**

It is not necessary that the manager, either when he sues or is sued, should be described as such in the pleadings. In a suit by the manager, where it is necessary, in order to safeguard the interest of the defendants, to implead the other members of the family, the defendants may apply to bring them on record (*b*).

(2) Where a transaction is entered into *in the names of two or more managers of the joint family*, they *must all* join as plaintiffs in the suit (*c*).

(3) Even if the suit be one on a contract which is *not in writing signed by the manager*, the manager may sue alone as representing the family (*d*).

(4) There is a conflict of opinion whether, as regards *immoveable property* belonging to a joint family, the manager is entitled as such to bring a suit to establish a right in respect of such property without making the other members of the family parties to the suit, it being held in some cases that he is (*e*), and in others that he is not (*f*). It would seem from a recent Privy Council decision that he is (*g*). [See sub-sec. (5) below].

In *Kishen Parshad* v. *Har Narain Singh* (*h*), their Lordships of the Privy Council in dealing with the judgment of Turner, C. J., in *Kattusheri* v. *Vallotil* (*i*), said:—

"Turner, C.J., held that all the co-owners in such a case must join, and that they could not invest the managers of their property with the right to sue in their own names or in a representative capacity. Their Lordships think that this proposition *thus broadly stated as to co-ownership* cannot be applied to the managing members of a business carried on for an undivided Hindu joint family. It was not so applied in the later case of *Arunachala* v. *Vythialinga* (*j*), where it was stated that the managing member of an undivided Hindu family suing as such is entitled to bring a suit to establish a right belonging to the family without making the other members of the family parties to the suit."

(*b*) *Mallhgouda Babaji* v. *Kalappa Balappa* (1934) 58 Bom. 348, 151 I.C. 370, ('34) A.B.178.

(*c*) *Ramsebuk* v. *Ram Lall* (1881) 6 Cal. 815; *Imam-ud-din* v. *Liladhar* (1892) 14 All. 524, both explained in 38 I.A. 45, 52, 53, 33 All. 272, 277-278, 9 I.C. 739.

(*d*) *Bhola Roy* v. *Jung Bahadur* (1914) 19 Cal. L.J. 5, 9, 22 I.C. 798, ('14) A.C. 681 [suit for rent].

(*e*) *Arunachala* v. *Vythialinga* (1883) 6 Mad. 27 [right to drain water of plaintiff's village through defendant's village]; *Md. Sadik* v. *Khedan Lal* (1916) 1 Pat. L.J. 154, 36 I.C. 197, ('16) A.P. 251 [suit to eject trespasser].

(*f*) *Kattusheri* v. *Vallotil* (1881) 3 Mad. 234 [against lessees for possession]; *Balkrishna* v. *Municipality of Mahad* (1886), 10 Bom 32 [to remove encroachment—suit by a coparcener]; *Hari Gopal* v. *Gokaldas* (1888) 12 Bom. 158 [suit in ejectment], *Balkrishna* v. *Moro Krishna* (1897) 21 Bom. 154 [suit in ejectment]; *Kashinath* v. *Chimnaji* (1906) 30 Bom. 477 [declaration of right to immoveable property], *Angamutu* v. *Kolandavellu* (1900) 23 Mad. 190 [ditto].

(*g*) *Lingangowda* v. *Basangowda* (1927) 54 I.A. 122, 51 Bom. 450, 101 I.C. 44, ('27) A.P.C. 56.

(*h*) (1911) 38 I.A. 45, 52, 33 All. 272, 277, 9 I.C. 739.

(*i*) *Kattusheri* v. *Vallotil* (1881) 3 Mad. 234.

(*j*) *Arunachala* v. *Vythialinga* (1883) 6 Mad. 27.

S. 251 The sons are not necessary parties to a suit brought *against* the father for possession of joint family property sold by him (*k*). A decree in a suit would bind all the members of a joint family even though some only were parties, if the interest of those who are not parties are sufficiently and substantially represented by the others and if the common title of all is affected (*l*).

As to suits on mortgage, see the Code of Civil Procedure, 1908, O. 34, r.1.

(*5*) It seems that the manager of a joint Hindu family may sue or be sued as representing the family in respect of a transaction entered into by him as manager of the family or in respect of joint family property, and that a decree passed against him in such a suit would bind all other members of the family if, as regards minors, he acted in the litigation in their interest (*m*), and, as regards adults, with their consent. The consent need not be express ; it will be implied if they do not come and apply to be joined as parties to the suit (*n*), but not if they applied to be made parties in order to contest the manager's action (*o*). In *Lingangowda* v. *Basangowda* (*p*), their Lordships of the Privy Council observed as follows :— "In the case of a Hindu family where all have rights, it is impossible to allow each member of the family to litigate the same point over and over again, and each infant to wait till he becomes of age, and then bring an action, or bring an action by his guardian before ; and in each of these cases, therefore, the Court looks to Explanation 6 of sec. 11 of the Code of Civil Procedure, 1908, to see whether or not the leading member of the family has been acting either on behalf of minors in their interest, or if they are majors, with the assent of the majors." Where a right to bring a suit was possessed by a father and other members then living and persons who were born later had also acquired the right before the right is barred by limitation the right will continue up to 3 years after majority of the youngest of the sons (*q*).

(*6*) A *coparcener*, who is not the managing member, is not entitled to sue alone as representing the family.

In *Alagappa* v. *Vellian* (*r*) *the plaintiff, who was a member of a joint family entered* into a contract with the defendant *in his own name*, whereby he appointed the defendant as manager of the family business in Moulmein. The plaintiff sued the defendant for

(*k*) *Guran Ditta* v. *Pokhar Ram* (1927) 8 Lah. 693, 104 I.C. 202, ('27) A.L. 362.

(*l*) *Kishan Lal* v. *Ram Chandar* I.L.R. (1944) All. 338.

(*m*) *Venkatnarayana* v. *Somarazu* (1937) Mad. 880 (F.B.), 171 I.C. 101, ('37) A.M. 610.

(*n*) See *Guravayya* v. *Datatraya* (1904) 28 Bom. 11.

(*o*) *Motilal* v. *Lalchand* (1937) Nag. 362, 172 I.C. 192, ('37) A.N. 121.

(*p*) (1927) 54 I.A. 122, 125, 51 Bom. 450, 453, 101 I.C. 44, ('27) A.PC. 56.

(*q*) *Ardes Kumar* v. *Zakaul Hussain* (1944) All. 612.

(*r*) (1895) 18 Mad. 33.

damages for breach of the contract of service. The Madras Court held that the plaintiff alone was not entitled to sue. As to this case their Lordships of the Privy Council observed as follows in *Kishen Parshad* v. *Har Narain Singh* (s) :— S. 251

"The decision in the case of *Alagappa* v. *Vellian* cited by the respondents may be supported on the ground that the single plaintiff in that case *was not shewn to be the managing member of the family* or to be the only partner or proprietor of the business with which the litigation was concerned. Their Lordships think, however, that the proposition there laid down to the effect that the *manager* cannot sue without joining all those interested with him, if literally construed, goes too far."

Where a promissory note was taken by a father, the son cannot sue on it during the father's life-time without proof of renunciation by the father amounting to civil death (t). A suit was filed by all the members of the joint family on a promissory note executed in favour of one of the members. The defendant denied that the family was joint and contended that the suit was not maintainable. The court held (1) that the family was joint; (2) the suit should be allowed to proceed by an appropriate amendment of the description of the plaintiffs and (3) in any event the suit was maintainable (u).

(7) Where a joint family carries on a business, the members of the family who are *minors* and who are not shown to have been admitted into the trading firm or to have taken any part in the business or exercised any control therein, need not be joined as plaintiffs in a suit to recover moneys due to the family trading firm (v). A Hindu joint family trading concern even when it carries on business under an assumed firm name may be sued in that name in respect of matters connected with the business carried on under that name and decree obtained in that form is valid (w).

(8) *Death of manager.*—On the death of the manager pending a suit or appeal to which he is a party as representing the joint family, the coparcener succeeding him as manager may be brought on the record, and the suit or appeal proceeded with. It is not necessary to bring his sons on the record (x). Where one manager obtained a decree and, after realising a portion of the amount, disappeared, the next manager of the family is entitled to be brought on the record for the purpose of continuing the execution proceedings (y).

(8A) Where a promissory note is taken by a manager but by a subsequent arrangement between the coparceners he

(s) (1911) 38 I.A. 45, 53, 33 All. 272, 278, 9 I.C. 739.
(t) *Krishnaji* v. *Hanmaraddi* (1934) 58 Bom. 536, 153 I.C. 800, ('34) A.B. 385.
(u) *Chaudri Atma Ram* v. *Umar Ali* (1941) Lah. 39, 190 I.C. 78, ('40) A.I. 256.
(v) *Lutchmanen* v. *Siva* (1899) 26 Cal. 349 ; *Anant Ram* v. *Channu Lal* (1903) 25 All. 378 ; *Lalji* v. *Keshowji* (1913) 37 Bom. 340, 17 I.C. 193.
(w) *Jamunadhar Poddar* v. *Jamunaram Bhakat* (1944) 2 Cal. 131.
(x) *Atma Ram* v. *Bankumal* (1930) 11 Lah. 598, 125 I.C. 369, ('30) A L. 561.
(y) *Narain Sarup* v. *Daya Shanker* (1938) All. 425, 175 I.C. 590, ('38) A.A. 256.

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becomes entitled only to a portion of the amount due under it, he can recover only his share (z). To such a suit the other sharers must be joined as parties.

(9) As to suits on promissory notes signed by the manager alone, see sec. 240 (4).

Illustrations.

(1) *L* and *R*, two brothers, constitute a joint family. The joint family carries on business as money-lenders in the name of *R.C.* *S* borrows moneys from time to time from the firm. Then *R* dies leaving a minor son. After *R*'s death there are further dealings between the firm and *S*. An account of the dealings is made up, and *S* passes a promissory note to the firm of *R.C.* for Rs. 12,000. *L*, the surviving brother, sues *S* upon the note. *L* had three minor sons at the date of the suit, and one son was born to him after the institution of the suit. It is not proved that either the minor son of *R* or the minor sons of *L* were admitted into the family firm. None of them is a necessary party to the suit: *Latchmanen* v. *Siva* (1899) 26 Cal. 349, 355. Sale, J., said: "Decrees obtained in such suits by or against the managers of the business will be presumed to have been obtained by or against them in their representative capacity, and will be binding on the whole joint family."

(2) If in the case put above *L* and *R* were both dead at the date of the suit, *all* the sons of *L* and *R* must be joint as plaintiffs to the suit: *Kalidas* v. *Nathu* (1883) 7 Bom. 217.

252. Adding new plaintiff and limitation.—Where coparceners who ought to have been joined as plaintiffs to a suit are not made parties to the suit, the Court may order that they be added as parties. But if the suit as regards them would then be barred by limitation, the whole suit must be dismissed as time-barred (a).

It has been held by the High Court of Bombay, that where a suit is brought by the *manager* of a joint family as representing the family (in that case the suit was for recovery of possession of family property) the question of the right of a manager to sue in that capacity is rather one of authority, if the other co-sharers are *adults*, and that the right to insist on the other coparceners being brought on the record is for the benefit of the defendant so as to insure himself against further litigation and is therefore dependent on the objection being taken at an early stage, the objection on the score of want of authorization being one of a character which it would clearly be open to the defendant to waive. If the defendant takes the objection to non-joinder of parties at a late stage of the suit,

(z) *Gopalu Pillai* v. *Kothandaram Ayyar* (1934) 57 Mad. 1082, 153 I.C. 916, ('34) A.M. 529.

(a) *Kalidas* v. *Nathu* (1883) 7 Bom. 217; *Ramsebuk* v. *Ram Lall* (1881) 6 Cal. 815; *Seshan* v. *Veera* (1909) 32 Mad. 284, 4 I.C. 38; *Girwar* v. *Makbunessa* (1916) 1 Pat. L.J. 468, 36 I.C. 542, ('16) A.P. 310. [Limitation Act, 1908, s. 22.]

the objection may be disregarded and the suit proceeded with (*b*). The same view has been taken by the High Court of Allahabad (*c*). The High Court of Calcutta has held, purporting to follow the Bombay decision, that the addition even of a *minor* coparcener after the expiry of the period of limitation as plaintiff to a suit on a mortgage is not fatal to the suit (*d*) **Ss. 252, 253**

Illustration.

A and *B* are members of a joint family which owns a house in Bombay. *A* alleging that *C* is in wrongful occupation of the house, *alone* sues *C* to recover possession of the house. The suit is instituted on January 1, 1911. The last date for instituting the suit is August 15, 1911. The suit comes on for hearing on 1st September 1911. *C* contends at the hearing that *B* is a necessary party to the suit. Here *B* is obviously a necessary party to the suit, and if he were to be added as a plaintiff the suit as regards him would be deemed to have been instituted on that date [the Indian Limitation Act, 1908, sec. 22], and this wou'd clearly be *after* the expiration of the period of limitation for instituting the suit. The suit must therefore be dismissed. But if *A* was the *manager* and *B* was an adult at the date of the suit the Court could direct *B* to be joined as a plaintiff even after the expiry of the statutory period *unless C* objected to *B*'s non-joinder at an early stage of the proceedings: *Gururayya* v. *Datatraya* (1904) 28 Bom. 11.

It will be seen from what is stated above that the question as to who should be joined as plaintiffs, dealt with in the preceding section is important because of the provisions of sec. 22 of the Indian Limitation Act, 1908.

253. Decree against manager and res judicata.—A decree passed against the manager of a joint family *as representing the family* for a debt contracted by him for family necessities, or for the family business, or in respect of family properties, operates as *res judicata* under the Code of Civil Procedure, sec. 11, Explanation 6, and is binding upon all members of the family including minors, and it may be executed against the whole coparcenary property, although the other members were not parties to the suit (*e*). It is otherwise, if the decree is against the manager *personally*. A decree, even for a family debt, passed against the manager *personally*, cannot be executed

(*b*) *Gururayya* v. *Datatraya* (1904) 28 Bom. 11 [suit for possession of land], following *Hari Gopal* v. *Gocaldas* (1888) 12 Bom. 158.

(*c*) *Pateshri* v. *Rudra Narain* (1904) 26 All. 528 [suit for possession], s. c. on app. to P.C. sub-nominee *Imdad Ahmad* v. *Pateshri Narayan* (1910) 37 I.A. 60, 32 All. 241, 6 I.C. 981. See also *Chetan Singh* v. *Sartaj Singh* (1924) 46 All. 709, 79 I.C. 1001, ('24) A.A. 908.

(*d*) *Tahkur Mani* v. *Dai Rani* (1906) 33 Cal. 1079. 1093.

(*e*) *Daulat Ram* v. *Mehrchand* (1888) 15 Cal. 70, 14 I.A. 187; *Lingangowda* v. *Basangowda* (1927) 54 I.A. 122, 51 Bom. 450, 101 I.C. 44, ('27) A.PC. 56; *Sheo Shankar* v. *Jaddo Kunwar* (1914) 41 I.A. 216, 36 All. 383, 24 I.C. 504, ('14) A.PC. 136, affirming *Jaddo Kunwar* v. *Sheo Shankar* (1911) 33 All. 71, 7 I.C. 902; *Sheo Pershad* v. *Rajkumar* (1893) 29 Cal. 453; *Kishen Pershad* v. *Har Narain Singh* (1911) 38 I.A. 45, 33 All. 272, 9 I.C. 739; *Baldeo* v. *Mobarak* (1902) 20 Cal. 583; *Kunjan* v *Sidda* (1899) 22 Mad. 461; *Hari* v. *Jairam* (1890) 14 Bom. 597; *Bhana* v. *Chundu* (1897) 21 Bom. 616; *Kashinath* v. *Chimnaji* (1906) 30 Bom. 477; *Sakharam* v. *Devji* (1899) 23 Bom. 372. In *Laxman* v. *Vinayak* (1916) 40 Bom. 329, 33 I.C. 956, ('16) A.B. 262, it was suggested that the rule laid down in this section applied only if the manager was the father, but this view is not correct.

S. 253 against the whole coparcenary property; it can be executed only against his interest in the property (*f*).

It is not necessary, in order that a decree against the manager may operate as *res judicata* against coparceners who were not parties to the suit, that the plaint or written statement should state in express terms that he is suing as manager or is being sued as a manager. It is sufficient if the manager is in fact suing or is being sued as representing the whole family (*g*). See sec. 251 (5).

Illustration.

A, *B*, and *C* are members of a joint family. *A* and *B* are the managing members. *A* and *B* borrow Rs. 5,000 from *P for the necessities of the family*. *P* sues *A* and *B* as *managers*, and obtains a decree against them *as such*. The decree may be executed against the whole coparcenary property including *C*'s interest therein, though *C* was not a party to the suit, and even if *C* was a minor: *Baldeo* v. *Mobarak* (1902) 29 Cal. 583.

Note.- In the case put above, *P* is entitled also to a personal decree against *A* and *B*, they being *parties* to the contract. Such a decree will enable *P* to proceed against the *separate* property also of *A* and *B*. But *P* is not entitled to a personal decree against *C*, even if *C* was an adult, for *C* was not a party to the contract. See s. 240.

Suit by or against manager in representative capacity.—A suit by or against the manager will be deemed to be one brought by him or against him *as representing the family* if the circumstances of the case show that he is the manager of the family and the property involved in the suit is family property (*h*). It is not necessary, where the manager is the plaintiff, that the plaint should state in distinct terms that he is suing as manager or where he is the defendant, that he is being sued as manager.

Decree dismissing manager's suit.– The decree referred to in this section may be one dismissing the suit brought by the manager as plaintiff (*i*).

Decree against father for injunction.– *A* and his son *B* are members of a joint family *A*'s neighbour *C* sues *A* for an injunction restraining *A* from tethering cows and storing fodder close to *C*'s premises, and a decree is passed against *A*. The decree may be executed after *A*'s death against his son *B*, though the son was not a party to the suit (*j*).

Order under sec. 145 *of Criminal Procedure Code*, 1898.—An adverse order passed under sec. 145 of the Criminal Procedure Code against the manager requiring him to deliver possession of a property to another person binds the other members of the family, though they were not parties thereto (*k*).

(*f*) *Viraragavamma* v. *Samudrala* (1885) 8 Mad. 208; *Guruvappa* v. *Thimma* (1887) 10 Mad. 316; *Sathuvayyan* v. *Muthusami* (1889) 12 Mad. 325; *Balbir Singh* v. *Ajudhia* (1887) 9 All. 142; *Ram Dayal* v. *Durga Singh* (1890) 12 All. 209; *Lachmi* v. *Kunja Lal and anr.* (1894) 16 All. 449; *Mela Mal* v. *Gori* (1922) 3 Lah. 288, 66 I.C. 485, ('22) A.L. 200.

(*g*) *Hari Lal* v. *Munman Koer* (1912) 34 All. 549, 15 I.C. 126; *Lalchand* v. *Sheogovind* (1929) 8 Pat. 788, 128 I.C. 331, ('29) A.P. 741; *Ram Kishan* v. *Ganga Ram* (1931) 12 Lah. 428, 133 I.C. 116, ('31) A.L. 559; *Pirthipal* v. *Rameshwar* (1927) 2 Luck. 288, 99 I.C. 154, ('27) A.O. 27; *Surendranath* v. *Sambhunath* (1928) 55 Cal. 210, 104 I.C. 219, ('27) A.C. 870.

(*h*) *Mulgand Co-operative Credit Society* v. *Shidlingappa Ishwarappa* (1941) Bom. 682, 197 I.C. 428, ('41) A.B. 385, 43 Bom. L.R. 807.

(*i*) See *Lingangawda* v. *Basangowda* (1927) 54 I.A. 122, 51 Bom. 450, 101 I.C. 44, ('27) A.P.C. 56.

(*j*) *Mani Lal* v. *Kikabhai* (1931) 33 Bom. L.R. 1118, 134 I.C. 968, ('31) A.B. 482; *Ganesh* v. *Narayan* (1931) 55 Bom. 709, 134 I.C. 961, ('31) A.B. 484.

(*k*) *Venkatasomaraju* v. *Varahalaraju* (1929) 52 Mad. 787, 122 I.C. 17, ('30) A.M. 48.

254. Decree against father as manager and res judicata.—A decree obtained against the father as manager of a joint family is binding upon his sons, if in the case of a minor sons he was acting in the former litigation on their behalf in their interest (*l*), and in the case of majors, with the assent of the majors. Such a decree operates as res judicata by virtue of the provisions of Explanation VI of sec. 11 of the Code of Civil Procedure (*m*). See sec. 251 (*5*). **Ss. 254-256**

IV.—ALIENATION OF COPARCENARY PROPERTY.

255. Who may alienate coparcenary property.—The following persons alone have power to alienate coparcenary property so as to pass a good title to the alienee :—

(1) the whole body of coparceners, where they are all adults (*n*) ;
(2) the manager, to the extent mentioned in section 242 ;
(3) the father, to the extent mentioned in section 256 ;
(4) a sole surviving coparcener in the circumstances mentioned in section 257.

No other coparcener is entitled to alienate coparcenary property so as to bind the other coparceners unless he is authorized by them to do so (*o*).

We are not dealing now with the power of a coparcener to alienate *his own interest* in coparcenary property. That subject is dealt with in secs. 258-260 below.

256. Alienation by father.—A Hindu father *as such* has special powers of alienating coparcenary property which no other coparcener has. In the exercise of these powers—

(1) he may make a gift of ancestral *moveable property* to the extent mentioned in sec. 225, and even of ancestral *immoveable property* to the extent mentioned in sec. 226 ;
(2) he may sell or mortgage ancestral property, *whether moveable or immoveable*, including the interest of his sons, grandsons and great-grandsons therein, for the payment of his own debt, provided the debt was an antecedent debt and was not incurred for immoral or illegal purposes [sec. 295].

(*l*) *Venkatanarayana* v. *Somaraju* (1937) Mad. 880 (F.B.) 171 I.C. 101, ('37) A.M. 610.

(*m*) (1927) 54 I.A. 122, 51 Bom. 450, 101 I.C. 44, ('27) A.PC. 56, *supra*.

(*n*) *Mahabeer Persad* v. *Ramyad* (1874) 12 Beng. L.R. 90, 94.

(*o*) *Gururappa* v. *Thimma* (1887) 10 Mad. 316 ; *Sheo Pershad* v. *Saheb Lal* (1893) 20 Cal. 453, 461 ; *Krishna* v. *Krishnasami* (1900) 23 Mad. 597, 600 ; *Pulloo Lal* v. *Ragubir Prasad* (1934) 9 Luck. 237, 147 I.C. 540, ('33) A.O. 535.

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(3) When the immoveable property consists of *raiyati* interest in lands, a father, if he is unable to cultivate them, may surrender such interest and the surrender would be upheld unless it is shown to be a dishonest transaction intended to prejudice the sons (*p*).

Except as aforesaid, a father has no greater power over coparcenary property than any other manager (*q*), that is to say, he cannot alienate coparcenary property except for legal necessity or for the benefit of the family [s. 242].

Thus a mortgage by the father for raising moneys for a speculative litigation, which is for his own benefit, is not for legal necessity and, there being no antecedent debt, such a mortgage is not binding on the sons' shares (*r*).

Where a father was converted to Christianity and afterwards was reconverted to Hinduism a mortgage by him during the minority of his son does not bind the son's share, as the father became divided from his son when he became a Christian and there could be no reunion with his son who was a minor (*s*).

The father is in all cases naturally, and in the case of minor sons, necessarily, the manager of the joint family [sec. 236]. As manager, he has the power to alienate coparcenary property, but only in the cases specified in s. 242 above. As father, he has power to alienate coparcenary property in the cases mentioned in the present section. Beyond that, he has no power to alienate coparcenary property.

257. Alienation by sole surviving coparcener.—(*1*) A person who for the time being is the sole surviving coparcener is entitled to dispose of the coparcenary property as if it were his separate property. He may sell or mortgage the property without legal necessity or he may make a gift of it. If a son is subsequently born to him or adopted by him, the *alienation*, whether it by way of sale, mortgage or gift, will nevertheless stand, for a son cannot object to alienations made by his father before he was born or begotten [sec. 270].

(*2*) As to dispositions by will, see s. 368 below.

Illustration.

A, *B* and *C*, three Hindu brothers, are members of a joint Mitakshara family. *B* and *C* die in *A*'s lifetime, leaving *A* as the sole surviving coparcener. *A* dies leaving a will whereby he bequeaths the coparcenary property to *D*. He leaves behind him a wife and a daughter. The will is valid as against the wife and the daughter. But if *A*'s wife was pregnant at the time of *A*'s death, and subsequently gave birth to a son, the son would take the coparcenary property by survivorship to the entire exclusion of *D*. The right of the posthumous son to succeed by survivorship on the principle of relation back to the time of the father's death stands on the same footing as that

(*p*) *Sheoprasad Sahu* v. *Deo Charan Sahu* (1934) 13 Pat. 390, 151 I.C. 188, ('34) A.P. 212.

(*q*) *Chinnayya* v. *Perumal* (1890) 13 Mad. 51; *Rayakkal* v. *Subbanna* (1893) 16 Mad. 84; *Bala* v. *Balaji* (1898) 22 Bom. 825; *Ningraeddi* v. *Lakshmawa* (1902) 26 Bom. 163 (gift to a concubine); *Rottala* v. *Pulicat* (1904) 27 Mad. 162.

(*r*) *Ram Chandra* v. *Jang Bahadur* (1926) 5 Pat. 198, 90 I.C. 553, ('26) A.P. 17.

(*s*) *Vella Venkatasubbayya* v. *Vella Venkatramayya* (1944) Mad. 33.

of a son *in esse* at the time of the father's death: *Hanmant* v. *Bhimacharya* (1887) 12 Bom. 105, 109-110.

It is a cardinal doctrine of the Mitakshara law that a member of a joint family cannot make a valid *gift* or *bequest* of his undivided interest in the coparcenary property so as to defeat the rights of the other members to take by survivorship (s. 258). The only exception is that of a sole surviving coparcener to the extent mentioned in the present section.

V.—ALIENATION OF UNDIVIDED COPARCENARY INTEREST.

258. Gift of undivided interest.—According to the Mitakshara law as applied in all the provinces, no coparcener can dispose of his undivided interest in coparcenary property by gift (*t*). He may, however, make a gift of his interest with the consent of the other coparceners (*u*).

Sole surviving coparcener.—As to gifts by a sole surviving coparcener, see s. 257 above; as to gifts by a father, see ss. 225 and 226 above.

Separate and self acquired property.—A coparcener may dispose of his separate or self-acquired property in any way he likes [s. 222].

259. Sale or mortgage of undivided interest—Bombay, Madras and the Central Provinces.—According to the Mitakshara law as administered in the Bombay and Madras Presidencies, a coparcener may sell, mortgage, or otherwise alienate *for value* his undivided interest in coparcenary property without the consent of the other coparceners (*v*).

The same rule applies to cases governed by the Mitakshara law as administered in the Central Provinces (*w*).

260. Sale or mortgage of undivided interest—Bengal and U.P.—According to the Mitakshara law as administered in Bengal and the United Provinces, no coparcener can alienate even for value his undivided interest *without the consent of the other coparceners* (*x*), unless the alienation be for legal

(*t*) *Baba* v. *Timma* (1884) 7 Mad. 357 [F.B]; *Ponnusami* v. *Thatha* (1886) 9 Mad. 273; *Ramanna* v. *Venkata* (1888) 11 Mad. 246; *Rottala* v. *Pulicat* (1904) 27 Mad. 162, at page 166; *Udaram* v. *Ranu* (1875) 11 Bom. H.C. 76; *Vandravandas* v. *Yamunabai* (1875) 12 Bom. H.C. 229; *Kalu* v. *Barsu* (1895) 19 Bom. 803.

(*u*) *Tagore* v. *Tagore* (1872) 9 Beng. L.R. 377, 396, L.R. Sup. Vol. 47, 66.

(*v*) *Tukaram* v. *Ramchandra* (1869) 6 Bom. H. C. A. C. 247; *Vasudev* v. *Venkatesh* (1873) 10 Bom. H. C. 139; *Fakirapa* v. *Chanapa* (1873) 10 Bom. H.C. 162; *Pandu* v. *Goma* (1919) 43 Bom. 472, 50 I.C. 765 ('19) A.B. 84; *Villa Butten* v. *Yamunamma* (1874) 8 Mad. H.C. 6; *Aiyyagari* v. *Aiyyagari* (1902) 25 Mad. 690, 703; *Nanjunda Swami* v. *Kanagaraju* (1919) 42 Mad. 154, 49 I.C. 666, ('19) A.M. 500 [settlement on daughter in consideration of marriage]; *Lakshman* v. *Ramchandra* (1880) 5 Bom. 48, 61, 7 I.A. 181; *Pandurang* v. *Bhagwandas* (1920) 44 Bom. 341, 55 I.C. 514, ('20) A.B. 341; *Suraj Bansi Koer* v. *Sheo Persad* (1879) 5 Cal. 148, 166, 6 I.A. 88, 101-102; *Balgobind Das* v. *Narain Lal* (1893) 15 All. 339, 351, 20 I.A. 116-125. See also cases cited in footnote (*c*) above. See also *Subba* v. *Venkatarami* (1915) 38 Mad. 1187, 1191, 36 I.C. 983, ('15) A.M. 710 [specific performance]

(*w*) *Syed Kasum* v. *Jorawar Singh* (1922) 49 I.A. 358, 50 Cal. 84, 68 I.C. 573, ('22) A.PC. 353; *Bhojraj* v. *Nathuram* (1917) 37 I.C. 498, 12 N.L.R. 161, ('16) A.N. 25.

(*x*) *Madho Parshad* v. *Mehrban Singh* (1891) 18 Cal. 157, 17 I.A. 194; *Sadabart Prasad* v. *Foolbash* (1869) 3 Beng. L.R.F.B.R. 31; *Kali Shankar* v. *Nawab Singh* (1909) 31 All. 507, 3 I.C. 909; *Balgobind Das* v. *Narain Lal* (1893) 15 All. 339, 351, 20 I.A. 116, 125; *Manna Lal* v. *Karu Singh* (1919) 1 Pat. L.T. 6, 56 I.C. 766, ('19) A.PC. 108; *Chandra Deo* v. *Mata Prasad* (1909) 31 All. 176, 1 I.C. 479 [F.B.]. For other cases, see s. 269 below.

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necessity [s. 242], or for payment by a father of antecedent debts [s. 295]. The consent of the other coparceners is necessary even if the alienation is made in favour of a coparcener (*y*).

The same rule applies to cases governed by the Mitakshara law as administered in Behar and Orissa (*z*), the Punjab (*a*), and in Oudh (*b*).

The alienation is not void but voidable [*vide* s. 269 (*1*) and 270 (*4*)] (*c*).

According to the strict theory of the Mitakshara law, each coparcener has a proprietary interest in the *whole* of the coparcenary property. No coparcener, therefore, can alienate his interest in the property without the consent of the other coparceners. This rule has been strictly applied in the United Provinces and in Bengal to cases governed by the Mitakshara law. But the rigour of the rule has been relaxed in favour of alienees *for value* in the Bombay and Madras Presidencies [s. 261] and in favour of *purchasers at an execution sale* throughout British India [s. 289].

Lease.—A lease stands on the same footing as a sale or mortgage (*d*).

261. Rights of purchaser of coparcener's interest.—According to the Mitakshara law as applied in Bombay and Madras, a coparcener may alienate his undivided interest in the entire joint family property, or his undivided interest in a specific property forming part of the joint family properties. But he has no right to alienate, *as his interest* any specific property belonging to the copracenary, for no coparcener can before partition claim any such property as his own; if he does alienate, the alienation is valid to the extent only of his own interest in the alienated property (*e*). According to the Mitakshara law as it prevails in Bengal and the United Provinces no coparcener can alienate even his own undivided interest in the coparcenary property without the consent of the other coparceners. If he does so, the alienation is void in its entirety; it is not valid even to the extent of his own interest in the property [s. 269]. But the Mitakshara law as administered in *all* the provinces allows the sale of the undivided interest of a coparcener *in execution of a decree* against him [s. 289]. The present section deals with the rights of the purchaser of a specific property, or of a coparcener's interest in the specific property, as to possession and partition, whether the property

(*y*) *Chandar* v. *Dampat* (1894) 16 All. 369.

(*z*) *Jwala Prasad* v. *Maharajah Protab* (1916) 1 Pat. L.J. 497, 37 I.C. 184, ('16) A.P. 203; *Amar Dayal* v. *Har Pershad* (1920) 5 Pat. L.J. 605, 58 I.C. 72, ('20) A.P. 433.

(*a*) *Piare* v. *Ram* (1912) P.R. No. 21, p. 75, 11 I.C. 443; *Ralla Ram* v. *Atma Ram* (1933) 14 Lah. 584, 150 I.C. 184, ('33, A.L. 343.

(*b*) (1891) 18 Cal. 157, 17 I.A. 194, *supra*; *Angraj* v. *Ram Rup* (1931) 6 Luck. 158, 127 I.C. 38, ('30) A.O. 284; *Puttoo Lal* v. *Ragubir Prasad* (1934) 9 Luck. 237, 147 I.C. 540, ('33) A.O. 535.

(*c*) *Kharag Narain* v. *Janki Bai* (1937) 16 Pat. 230, 169 I.C. 906, ('37) A.P. 546.

(*d*) *Jadu* v. *Abdul* (1911) 16 C.W.N. 93, 11 I.C. 892.

(*e*) *Vitla Butten* v. *Yamenamma* (1874) 8 Mad. H.C. 6, 11; *Venkatachella* v. *Chinnaiya* (1875) 5 Mad. H.C. 166, 171; *Patil Hari* v. *Hakamchand* (1886) 10 Bom. 363 [mortgage].

has been sold by private treaty or in execution. Almost all the cases dealt with in this section relate to the sale of a specific property or the sale of the undivided interest of a coparcener in a specific property. The principles laid down in those cases apply *mutatis mutandis* to the case of a sale of the undivided interest of a coparcener in *all* the joint family properties. **S. 261**

(1) *Right to joint possession in Bengal, United Provinces and Madras.*—As regards the purchaser's right to joint possession the Bombay decisions differ in certain respects from those of the other High Courts. We shall deal first, with the decisions of High Courts other than Bombay, and next, with Bombay decisions.

The purchaser of the undivided interest of a coparcener in a specific property—

(*i*) at a sale in execution in Bengal (*f*) and the United Provinces, or

(*ii*) at a private sale or a sale in execution in Madras (*g*), does not acquire a right to *joint possession* with the other coparceners. Such a purchaser acquires merely the right to compel a *partition* which the coparcener whose interest he has purchased might have compelled, had he been so minded, before the sale of his interest took place. That right can only be enforced by a suit for a general partition to which all the coparceners must be joined as parties (*h*). The purchaser may in such a suit ask the Court to allot to his vendor the specific property sold to him, and the Court may allot that property to him if the interest of the other coparceners will not be prejudiced thereby [sub-sec. 3].

Where the purchaser *has not obtained possession*, but claims the whole property as his own, the non-alienating coparceners may sue him for a declaration that he is entitle to no more than the undivided interest of the alienating coparcener. The proper decree to be passed in such a suit would be an order declaring that, by virtue of the sale, the

(*f*) *Deen Dayal* v. *Jugdeep Narain* (1877) 3 Cal. 198, 209, 4 I.A. 247; *Suraj Bansi Koer* v. *Sheo Pershad* (1880) 5 Cal. 148, 174, 6 I.A. 88; *Hardi Narain* v. *Ruder Perkash* (1883) 10 Cal. 626, 636-637, 11 I.A. 26.

(*g*) *Maharaja of Bobbili* v. *Venkataramanjula* (1916) 39 Mad. 265, 267, 25 I.C. 585, ('15) A.M. 453; *Manjaya* v. *Shanmuga* (1915) 38 Mad. 684, 22 I.C. 555, ('14) A.M. 440 [private sale].

(*h*) *Villa Butten* v. *Yamenamma* (1874) 8 Mad. H. C. 6. The executing Court has no power to direct a partition: *Yelumalai* v. *Srinivasa* (1906) 29 Mad. 294; *Brij Lal* v. *Durga* (1920) 1 Lah. 134, 56 I.C. 254, (20) A.L. 159.

S. 261 (1) purchaser acquired *only* the undivided share of the alienating coparcener in the property with such power of ascertaining the extent of such share by means of a partition as the alienating coparcener possessed and confirming the possession of the other coparceners subject to such proceedings as the purchaser may take to enforce his rights (*i*). If the purchaser *has obtained possession*, the non-alienating coparceners, are entitled to sue for and recover possession of the *whole of the* property for the benefit of the joint family including the vendor. The purchaser is not entitled in such suit to an order for partition either of the specific property sold to him or of the joint family properties in general; he must, if he wants to realize his vendor's interest, bring a suit of his own for a general partition. Where a suit therefore is brought by the non-alienating coparceners for possession, the proper decree to be passed would be an order directing the purchaser to deliver possession to the plaintiffs of the *whole* property, and declaring that the purchaser is entitled to a declaration that he has acquired the undivided interest of his vendor in the property and that he is entitled to take proceedings to have that interest ascertained by partition (*j*). But to protect the purchaser a further direction is added that the execution of the decree, so far as it directs the purchaser to deliver possession to the plaintiffs, be stayed for a specified period, and if before the expiry of that period the purchaser brings a suit for a general partition against the plaintiffs then the stay should continue until the disposal of that suit, but if no such suit is brought within that period, then the stay of execution will stand cancelled (*k*). In a recent case (*l*), however, the Madras High Court held, relying upon the observations of the Judicial Committee in *Ramkishore* v. *Jainarayan* (*m*), that when relief by way of general partition can be conveniently given to the purchaser in a coparceners' suit for possession, as where all the coparceners are parties to the suit and the Court is seized of the whole matter, the purchaser should not be driven to a

(*i*) *Suraj Bunsi Koer* v. *Sheo Pershad* (1880) 5 Cal. 148, 174-175, 6 I.A. 88.

(*j*) *Deen Dayal* v. *Jugdeep Narain* (1877) 3 Cal. 198, 209, 4 I.A. 247; *Baboo Hurdey Narain* v. *Ruder Perkash* (1883) 10 Cal. 626, 637, 11 I.A. 26; *Subba* v. *Krishnamachari* (1922) 45 Mad. 449, 460-463, 68 I.C. 809, ('22) A.M. 112 [private sale]; *Kandasamy* v. *Velayutha* (1927) 50 Mad. 320, 328, 96 I.C. 993, ('26) A.M. 774 [private sale]; *Medni Prasad* v. *Nand Keshwar* (1923) 2 Pat. 386, 85 I.C. 1014, ('23) A.P. 451 [sale in execution].

(*k*) *Kandasamy* v. *Velayutha* (1927) 50 Mad. 320, 328, 96 I.C. 993, ('26) A.M. 744; *Hanmandas* v. *Valabhdas* (1919) 43 Bom. 17, 25-26, 46 I.C. 133, ('18) A.B. 101.

(*l*) *Ramasami* v. *Venkatarama* (1923) 46 Mad. 815, 75 I.C. 406, ('24) A.M. 81 [private sale]. See also *Sellappa* v. *Masa* (1924) 47 Mad. 79, 76 I.C. 1018, ('24) A.M. 297.

(*m*) (1913) 40 Cal. 966, 40 I.A. 213, 20 I.C. 958.

separate suit [ill. (a)]. Referring to this case the same High Court said in a later case (*n*): "The decision in 46 Mad. 815 applies to cases where all the facts are before the Court which would enable it to allow an alienee to retain the property and such a suit is practically a suit for partition." **S. 261 (1)**

Right to joint possession in Bombay.—The following principles have been laid down with regard to the rights and remedies of the purchaser and the non-alienating coparceners, whether the sale be one private contract or in execution of a decree (*o*):

(1) If the purchaser is a *stranger*, and *has not obtained possession*, he should not be given joint possession with the other coparceners, but should be left to his remedy of a suit for general partition (*p*).

(2) If the purchaser *has obtained possession*, the non-alienating coparceners are entitled to *joint possession* of the property with him, and if they sue for it, the Court must decree joint possession to them (*q*). The reason given is that the purchaser cannot, by obtaining a possession to which he was not entitled without partition, force on the other coparceners the necessity of bringing a suit for partition (*r*). The proper decree to pass in such a case is one placing the plaintiffs-coparceners in joint possession with the purchaser. A mere declaration of the plaintiffs' right to joint possession is not enough (*s*).

(3) Further, if the purchaser *has obtained possession*, the non-alienating coparceners may sue for recovery of possession of the whole of the property sold to him, in

(*n*) (1927) 50 Mad. 320, 324, 96 I.C. 993, ('26) A.M. 774 [private sale], *supra*.

(*o*) *Bhau* v. *Budha* (1926) 50 Bom. 204, 206, 96 I.C. 166, ('26) A.B. 309 [where the earlier cases are collected].

(*p*) *Pandurang* v. *Bhaskar* (1874) 11 Bom. H.C. 72; *Krishnaji* v. *Sitaram* (1881) 5 Bom. 496; *Balaji* v. *Ganesh* (1881) 5 Bom. 499; *Pandu* v. *Goma* (1919) 43 Bom. 472, 50 I.C. 765, ('19) A.B. 84; *Ishrappa* v. *Krishna* (1922) 46 Bom. 925, 931, 67 I.C. 833, ('22) A.B. 413.

(*q*) *Mahabalya* v. *Timaya* (1874) 12 Bom. H.C. 138 [coparceners' suit for joint possession]; *Babaji* v. *Vasudev* (1876) 1 Bom. 95 [ditto]; *Kallapa* v. *Venkatesh* (1878) 2 Bom. 676, at p. 678; *Dugappa* v. *Venkatramnaya* (1881) 5 Bom. 493 [suit by coparceners for possession of entire property—*held* entitled only to joint possession with purchaser]; *Patil Hari* v. *Hakamchand* (1886) 10 Bom. 363 [mortgagee with possession from one coparcener dispossessed by purchaser at a sale in execution of a decree against another coparcener—*held* mortgage entitled to joint possession with purchaser]; *Nana* v. *Appa* (1896) 20 Bom. 627 [suit by purchaser for exclusive possession—joint possession decreed]; *Naranbhai* v. *Ranchod* (1902) 26 Bom. 141 [purchaser's suit for exclusive possession—suit dismissed by trial judge—decree reversed and suit remanded for inquiry whether purchaser should be awarded joint possession on the merits of the case]; *Bhiku* v. *Puttu* (1906) 8 Bom. L.R. 99, 105-106.

(*r*) (1906) 8 Bom. L.R. 99, 106, *supra*.

(*s*) (1902) 26 Bom. 141, 145, *supra*.

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other words, they may sue for exclusive possession. But the Court is not bound, as in Madras, to eject the purchaser and decree exclusive possession to the plaintiffs, and it may in its discretion declare that the purchaser is entitled to hold the property until partition, as a tenant-in-common with the other coparceners; in other words, the Court may in a proper case allow the purchaser to remain in joint possession with the plaintiffs. Each case as to the propriety or otherwise of allowing the purchaser joint possession should be decided on its own facts (*t*). Thus the Court may not eject the purchaser if he is a relative of the parties and has long been in possession, but may allow him to continue in joint possession with the other coparceners. If they do not like joint possession with the purchaser, their remedy lies in suing for a partition (*u*). If the case is one in which joint possession should be allowed, the proper decree to pass is one placing the plaintiffs in joint possession with the defendant purchaser. If the case is one in which joint possession should not be allowed, the proper decree to pass would be an order directing the purchaser to deliver possession of the *whole* property to the plaintiffs, and declaring that the purchaser has acquired the undivided interest of his vendor in the property and that he is entitled to take proceedings to have that interest ascertained by partition, with a further direction that the execution of the decree be stayed for a specified period, and if before the expiry of that period the purchaser brings a suit for a general partition against the plaintiffs then the stay should continue until the disposal of that suit, but if no such suit is brought within that period, then the stay of execution will be cancelled (*v*).

Difference between Madras and Bombay views.—The main point of difference between the Madras and Bombay High Courts is that while in Madras the purchaser is not entitled in any case to joint possession before partition, in Bombay

(*t*) *Bhau* v. *Budha* (1927) 50 Bom. 204, 96 I.C. 166, ('26) A.B. 309, and the cases cited in f. n. (*q*) above.

(*u*) (1927) 50 Bom. 204, 96 I.C. 166, ('26) A.B. 309, *supra*.

(*v*) *Hanmandas* v. *Valabhdas* (1919) 43 Bom. 17, 25-26, 46 I.C. 133, ('18) A.B. 101.

the Court may in its discretion award joint possession to him. The reasons for this difference are as follows :— S. 261 (1), (2)

(a) According to the Bombay decisions, the purchaser from a coparcener is a tenant-in-common with the other coparceners (*w*). A similar view was taken by the High Court of Madras in some of the earlier cases, but that view has since been disapproved, and it has been held that the purchaser is not a tenant-in-common, but has only an equity to enforce his rights by partition (*x*).

(b) The Madras High Court (*y*) has interpreted the judgments of the Judicial Committee in the under-mentioned cases (*z*) as laying down the broad proposition that the purchaser in possession is liable to be ejected at the instance of the non-alienating coparceners. Commenting on this Fawcett, J., said in a recent Bombay case that they were all cases from Bengal where one coparcener has not authority, without the consent of his coparceners, to alienate even his own undivided interest in coparcenary property, and that the Privy Council decisions do not amount to saying that *in no case* can the Court properly allow a stranger purchaser to remain in possession with the non-alienating coparceners (*a*).

(2) *Right to partition.*—In Bombay (*b*) and Madras (*c*), the purchaser of the undivided interest of a coparcener in a specific property belonging to the joint family is not entitled to a partition of that property alone, for his vendor himself could not have claimed it, unless the other coparceners consent to it. He can only enforce his rights by a suit for a general partition. In Allahabad (*d*), and in Calcutta (*e*) it has been held that the purchaser is entitled to a partition of the specific property without suing for a general partition, but these decisions are of doubtful authority.

(*w*) See *Mahabalaya* v. *Timaya* (1875) 12 Bom. H.C. 138, 140, which is the first Bombay case on the subject.

(*x*) *Manjaya* v. *Shunmuga* (1915) 38 Mad. 684, 22 I.C. 555, ('14) A.M. 440; *Maharaja of Bobbili* v. *Venkatramanjulu* (1916) 39 Mad. 265, 25 I.C 585, ('15) A.M. 453.

(*y*) (1916) 39 Mad. 265, 268-269, 25 I.C. 585, ('15) A.M. 453, *supra*.

(*z*) *Suraj Bunsi Koer* v. *Sheo Pershad* (1880) 5 Cal. 148, 6 I.A. 88; *Hardi Narain Ruder Perkash* (1883) 10 Cal. 626, 11 I. A. 26; *Ramkishore* v. *Jainarayan* (1913) 40 Cal. 966, 40 I.A. 213, 20 I.C. 958.

(*a*) *Bhau* v. *Budha* (1926) 50 Bom. 204-207-209, 96 I.C. 166, ('26) A.B. 309.

(*b*) *Udaram* v. *Ranu* (1875) 11 Bom. H.C. 76; *Murarrao* v. *Sitaram* (1899) 23 Bom. 184; *Shivmurteppa* v. *Virappa* (1900) 24 Bom. 128; *Ishrappa* v. *Krishna* (1922) 46 Bom. 925, 67 I.C. 833, ('22) A.B. 413.

(*c*) *Venkatarama* v. *Meera* (1890) 13 Mad. 275; *Palani* v. *Masakoan* (1897) 20 Mad. 243; *Manjaya* v. *Shanmuga* (1915) 38 Mad. 684, 22 I.C. 555.

(*d*) *Rammohan* v. *Mulchand* (1906) 28 All. 39.

(*e*) *Tarinicharan Chakrabarti* v. *Debendrala De* (1935) 62 Cal. 655.

S. 261 (2), (3) The non-alienating coparceners, on the other hand, are entitled in Bombay (*f*), Madras (*g*), and Allahabad (*h*), to sue the purchaser for partition of the alienated property without bringing a suit for a general partition. But one of several non-alienating coparceners cannot sue the purchaser for his own share of the alienated property (*i*).

Where a suit is brought by the non-alienating coparceners against the purchaser for partition only of the property alienated, as they are entitled to do, the purchaser is not entitled *in that suit to counter-claim* for a general partition. He must bring a suit of his own for a general partition (*j*).

Where a suit has been brought by the non-alienating coparceners against the purchaser for partition only of the property alienated, and an *unconditional* decree is passed for partition of the alienated property and for delivery of their share to them, the share so delivered becomes the *separate property* of the non-alienating coparceners (*k*). But it would continue as *joint* if the relief granted to the non-alienating coparceners is made *conditional* on their assenting to the results of a suit for general partition which the alienee may offer to bring (*l*).

The share allotted to the non-alienating coparcener is his *separate* property as between him and the alienating coparcener, but not as between him and his male issue.

(3) *Equitable rights of purchaser on partition.*—The alienee of a specific property or of the undivided interest of a coparcener in such property has on a general partition an equitable right to have that property (*m*), or his alienor's share in that property (*n*), as the case may be, assigned to him if it could be done without injustice to the other coparceners. But there may be equities between the coparceners or liabilities

(*f*) *Hanmandas* v. *Valabhdas* (1919) 43 Bom. 17, 26, 46 I.C. 133, ('18) A.B. 101; *Naro Gopal* v. *Para Gauda* (1917) 41 Bom. 347, 355, 39 I.C. 23, ('16) A.B. 130.

(*g*) *Venkatachella* v. *Chinnaya* (1870) 5 Mad. H.C. 166; *Chinna* v. *Suriya* (1882) 5 Mad. 196; *Subramanya* v. *Padmanabha* (1896) 19 Mad. 267; *Iburamsa* v. *Theruvenkatasami* (1911) 34 Mad. 269 (F.B.), 7 I.C. 559 [suit by purchaser from non-alienating coparcener].

(*h*) *Ram Charan* v. *Ajudhia* (1906) 28 All. 50.

(*i*) *Shyam Sunder* v. *Jagarnath* (1923) 2 Pat. 925, 74 I.C. 758, ('23) A.P. 590.

(*j*) *Kandasamy* v. *Velayutha* (1927) 50 Mad. 320, 96 I.C. 993, ('26) A.M. 774.

(*k*) *Souri* v. *Pachia* (1926) 49 Mad. 483, 91 I.C. 868, ('26) A.M. 241.

(*l*) See *Ramkishore* v. *Jainarayan* (1913) 40 Cal. 966, 40 I.A. 213, 20 I.C. 959; *Hanmandas* v. *Valabhdas* (1919) 43 Bom. 17 46 I.C. 133, ('18) A.B. 101.

(*m*) *Pandurang* v. *Bhaskar* (1875) 11 Bom. H.C. 72; *Udaram* v. *Ranu* (1875) 11 Bom. H.C. 76; *Aiyyagari* v. *Aiyyagari* (1902) 25 Mad. 690, 718-719 [F.B.]; *Chinnu Pillai* v. *Kalimuthu* (1912) 35 Mad. 47, 62, 9 I.C. 596 [F.B.]; *Dhulabhai* v. *Lala Dhula* (1922) 46 Bom. 28, 64 I.C. 115, ('22) A.B. 137; *Kandasamy* v. *Velayutha* (1927) 50 Mad. 320, 324, 96 I.C. 993, ('26) A.M. 774; *Gurlingappa* v. *Sabu* (1931) 33 Bom. L.R. 141, 131 I.C. 886, ('31) A.B. 218.

(*n*) *Venkatarama* v. *Meera* (1890) 13 Mad. 275, (1902) 25 Mad. 690, 718-719 [F.B.], *supra*; *Manjaya* v. *Shanmuga* (1915) 38 Mad. 684, 22 I.C. 555, ('14) A.M. 440.

S. 261 (3)-(6)

attaching to the alienor's share which may render it inequitable or impracticable to do so (*o*). In such a case the alienee is entitled to recover from his alienor property of an equivalent value out of the properties allotted to the alienor for his share in substitution of the property alienated (*p*). In making adjustments, the court will take the value of the properties at the time of the division and not at the time of the sale (*q*). But a purchaser at a Court-sale has no such right, there being no warranty of title at such a sale (*r*); and it has been held that a vendee from the first purchaser also has no such right, and that his only remedy is to sue his own vendor (that is, the first purchaser) for damages for breach of warranty, the reason given being that to hold otherwise would be to give to such vendee property which he never bargained for (*s*). But this argument, it is submitted, applies equally as between the alienor and the immediate purchaser from him.

(4) *Right to sue for partition even after vendor's death.*—The purchaser of the interest of a coparcener is not bound to sue for partition in the lifetime of the coparcener. He may sue after his death. The right which he has to a partition is not lost by the death of the coparcener (*t*).

(5) *Share to which purchaser is entitled on partition.*—The share to which an alienee is entitled on partition is the share to which the alienor was entitled *at the date of alienation*, and not at the date when the alienee seeks to reduce his interest into possession (*u*) [ills. (c) and (d)]. But this principle applies only to the fraction representing the share of the alienor. As to the actual items of property in which the purchaser is entitled to a share, it has been held that the family property as existing on the date of the suit, is to be taken (*v*).

(6) *Right to mesne profits.*—The purchaser of the interest of a coparcener is not entitled to mesne profits between the date of his purchase and the date of his suit for partition (*w*).

(*o*) (1902) 25 Mad. 690, 718-719, *supra*.

(*p*) (1915) 38 Mad. 684, 687, 22 I.C. 555, ('14) A.M. 440, *supra*; *Sabapathi* v. *Tharda-varoya* (1920) 43 Mad. 309, 310-311, 54 I.C. 515, ('20) A.M. 316. See (1875) 11 Bom. H.C. 76, 83, *supra*.

(*q*) *Virupaksha Reddi* v. *Chanalal Siva Reddi* (1944) Mad. 212.

(*r*) (1920) 43 Mad. 309, 54 I.C. 515, ('20) A.M. 316, *supra*.

(*s*) *Dhadha Sahib* v. *Muhammad* (1921) 44 Mad. 167, 59 I.C. 311.

(*t*) (1902) 25 Mad. 690, *supra*.

(*u*) *Chinnu Pillai* v. *Kalimuthu* (1912) 35 Mad. 47, 9 I.C. 596 [F.B.]; *Naro Gopal* v. *Paragauda* (1917) 41 Bom. 347, 39 I.C. 23, ('16) A.B. 130, dissenting from the observations in *Gurlingapa* v. *Nandapa* (1896) 21 Bom. 797 on p. 805.

(*v*) *Muthukumara Sathapathiar* v. *Sivanarayana Pillai* (1933) 56 Mad. 534, 141 I.C. 122, ('33) A.M. 158.

(*w*) *Maharaja of Bobbili* v. *Venkataramanjulu* (1916) 39 Mad. 265, 25 I.C. 585, ('15) A.M. 453; *Trimbak* v. *Pandurang* (1920) 44 Bom. 621, 57 I.C. 582, ('20) A.M. 103.

S. 261 (6)-(9) But where the family had become divided in status without a division of the property by metes and bounds, the purchaser of the undivided share of one of the members of the family is entitled to claim mesne profits from the members in possession thereof (*x*).

(7) *Right to sue for specific performance.*—If the coparcener who has sold his interest dies before completion of the sale, the purchaser is nevertheless entitled to specific performance of the agreement for sale (*y*).

(8) *Purchaser takes subject to equities.*—The alienee of a single coparcener's interest takes such interest subject to all charges, incumbrances and liabilities, affecting the coparcenary property or that interest (*z*). Thus the purchaser of the undivided interest of a son in joint family property takes that interest subject to the liability attaching to that interest to pay his father's personal debts not tainted with immorality (*a*) [s. 290].

(9) *Right to impeach previous alienations.*—See sec. 270 (4) below.

Illustrations.

(a) *A* and his son *B* are members of a joint family. *A* sells a certain item of the joint family property to *C*, the sale not being for legal necessity or for payment of antecedent debts, and puts *C* in possession. The value of the property alienated is *less* than the value of *A*'s share. There is no person interested in the joint family porperties except *A* and *B*. *A* sues *B* and *C* for possession of the property. According to a Madras decision, it is competent to the Court in such a case to declare that *C* is entitled to retain the property as the purchaser thereof, without driving him to the necessity of filing a fresh suit for partition: *Ramasami* v. *Venkatarama* (1923) 46 Mad. 815, 75 I.C. 406, ('24) A.M. 81.

(b) *A* and *B* are members of a joint Hindu family. *C* is a *bhauband* (relation) of *A* and *B*. *B* sells his undivided share in one of the joint family properties to *C*. *C* enters into possession of the whole of that property, and continues in possession for several years. Subsequently *A* sues *C* for exclusive possession of the property. In such a case, according to the Bombay rulings, the proper decree would be a decree putting *A* in joint possession with *C*, leaving *A* if he is not willing to continue in joint possession with *C* to file a suit for partition: *Bhau* v. *Budha* (1926) 50 Bom. 204, 96 I.C. 166, ('26) A.B. 390. According to the Madras rulings, the proper decree would be one directing *C* to deliver possession of the whole property to *A*, and declaring that *C* had acquired the undivided interest of *B* in the property with liberty to *C* to file a suit to have that share ascertained by a general partition. The Court may also stay execution for a fixed period to enable *C*

(*x*) *Sitaramamurthi* v. *Venkayya* (1934) 57 Mad. 667, 148 I.C. 1086, ('34) A.M. 364.

(*y*) *Bhagwan* v. *Krishnaji* (1920) 44 Bom. 967, 58 I.C. 335, ('20) A.B. 104.

(*z*) *Udaram* v. *Ranu* (1875) 11 Bom. H.C. 76; *Narayan* v. *Nathaji* (1904) 28 Bom. 201; *Venkureddi* v. *Venku Redi* (1927) 50 Mad. 535, 538, 100 I.C. 1018, ('27) A.M. 471.

(*a*) (1927) 50 Mad. 535, 100 I.C. 1018, ('27) A.M. 471, *supra*.

to bring the suit: *Subba* v. *Krishnamachari* (1922) 45 Mad. 449, 68 I.C. 869, ('22) A.M. 112. *Kandasami* v. *Velayutha* (1927) 50 Mad. 320, 96 I.C. 993, ('26) A.M. 774. The decree would be the same in form in Bombay if the Court held upon the facts of the case that the purchaser should not be allowed joint possession with *A*: *Bhau* v. *Budha* (1926) 50 Bom. 204, 96 I.C. 166, ('26) A.B. 399. **S. 261 (9)**

(c) *A* mortgages certain ancestral property to *M*. Subsequent to the mortgage a son is born to *A*. Thereafter a partition takes place between *A* and *B*, and the mortgaged property is divided between them equally. *M* then sues *A* and *B* for a sale of the mortgaged property. *B* objects to a decree against his half share. *B*'s objection must be overruled and a decree passed for the sale of the *whole* property, as the father was entitled to the whole of the property *at the date of the mortgage*: *Chinnu Pillai* v. *Kalimuthu* (1912) 35 Mad. 47, 9 I.C. 596. The same principle applies to sales: *Naro Gopal* v. *Paragauda* (1917) 41 Bom. 347, 39 I.C. 23, ('16) A.B. 130.

(d) *A*, *B* and *C* are members of a coparcenary. *A*'s interest in the coparcenary property is sold, and it is purchased by *P*. *B* dies after the sale. *P* then sues *A* and *C* for partition. *P* is entitled on partition not to one-half, but to one-third only, the latter being *A*'s share *at the date of sale*. *B*'s one-third share will pass to *A* and *C* by survivorship each taking one-sixth.

(e) *A*, a member of a joint family, sells one of the joint properties *x* to *B*. Afterwards *A* sues his coparceners for partition, and another property *y* of an equal value is allotted to him on partition. Is *B* entitled to recover property *y* from *A*? It has been held that he is. But it has been held that if *B* sells property *x* to *C*, and a partition subsequently takes place between *A* and his coparceners, and property *y* is allotted to *A* on partition, *C* is not entitled to recover property *y* from *A*, and that *C*'s only remedy is to sue *B* for damages for breach of warranty, the reason given being that *C* never bargained for that property.

Privy Council rulings.—The three leading Privy Council cases bearing on the subject dealt with in the present section are—

(1) *Deen Dayal* v. *Jugdeep Narain* (1877) 3 Cal. 198, 4 I.A. 247.
(2) *Suraj Bansi Koer* v. *Sheo Persad* (1880) 5 Cal. 148, 6 I.A. 88.
(3) *Hardi Narain* v. *Ruder Perkash* (1883) 10 Cal. 626, 11 I.A. 26.

In cases (1) and (3), a money decree was obtained against the father, and his "right, title and interest" in a specific property belonging to the family was sold in execution of the decree, the decree-holder himself being the purchaser. In both these cases, the purchaser *obtained possession* of the *whole* property. The cases were governed by the Mitakshara law as applied in Bengal, and the suit was brought by the sons to set aside the sale in *its entirety* on the ground that the debt incurred by the father was without legal necessity, and the sale therefore was invalid and that it did not, according to the Mitakshara law as applied in Bengal [s. 260], pass even the father's interest in the property as the father himself could not have, according to that law, sold his interest. On the other hand, it was contended for the purchaser that the debt was contracted for a justifying necessity and that he was entitled to the *whole* property including the sons' interest. It was found in each case that the debt was incurred without legal necessity and it was held that the sale being one in execution of a decree (as distinguished from a voluntary sale), the purchaser acquired the father's interest in the property [s. 289]. But the purchaser did not acquire the sons' interest, for what was attached and sold was the "right, title and interest" of the father only in the property. The Judicial Committee accordingly passed a decree directing the purchaser to deliver possession of the whole property to the sons and declaring that the purchaser had acquired the interest of the father and was entitled to take proceedings to have that interest ascertained by partition.

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Case (2) was also governed by the Mitakshara law, as applied in Bengal. The suit in that case was brought against the father for a sale of a family property mortgaged by him, and a decree was passed for a sale of the property. The property was put up for sale and was purchased by a stranger. The sons had before the sale objected to the sale on the ground that the debt incurred by the father was for immoral purposes, but they were referred by the executing Court to a regular suit. After the sale, the sons brought a suit to set aside the sale. The purchaser *had not entered into possession* of the property as in cases (1) and (3). It was found that the debt incurred by the father was for immoral purposes. The Judicial Committee held that the proper decree to be passed was an order declaring that the purchaser acquired the undivided interest of the father in the property with such power of ascertaining the extent of that interest by means of a partition as the judgment-debtor himself possessed before the sale and an order confirming the possession of the sons subject to such proceedings to enforce his right as the purchaser might take.

The form of the decree in cases (1) and (3) applies where the purchaser has obtained possession of the property; that in case (2) applies where he has not obtained possession. The substance of these forms is set out in sub-sec. (*1*) of the present section. Their application is not confined to Court-sales. They also apply to voluntary or private sales. It will be noted that in cases (1) and (3), the Judicial Committee directed the purchaser by their judgment to deliver possession of the whole property to the sons, though they declared that the purchaser was entitled to the undivided interest of the father. On the strength of these decisions the High Court of Madras has held, as pointed out in sub-sec. (*1*), that the purchaser is not *in any case* entitled to joint possession with the non-alienating coparceners. But the High Court of Bombay has declined to adopt this extreme view.

262. Position of coparcener whose undivided interest has been sold.—Where the undivided interest of a coparcener has been sold, but there has been no partition either at the instance of the purchaser or of the other coparceners, the sale does not affect the *status* of such coparcener in the family, nor does it extinguish his right to take by survivorship the interest of other coparceners on their death (*b*). Even if the other coparceners sue to set aside the sale and to recover their share of the property sold it does not normally amount to a partition. Whether it does or not depends on the form of the plaint and the relief granted (*c*).

See ill. (d) to s. 261, at p. 313.

263. Rights of mortgagee from a coparcener.—(*1*) The principles laid down in s. 261 above apply *mutatis mutandis* to a mortgagee of joint family property from a coparcener. When a mortgage executed by a father for himself and an only minor son was found to be not binding on the joint property and when another son was born at the time of suit, the

(*b*) *Gurlingapa* v. *Nandapa* (1897) 21 Bom. 797, 803.

(*c*) *Chimalkonda Ramsubbaraya Sastri* v. *Ganapathi Raju Venkata Appalulanarasimha Raju* (1940) Mad. 405, 188 I.C. 700, ('40) A.M. 217.

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mortgage is binding on a half-share and not merely one-third-share (*d*).

(*2*) Where a coparcener mortgages a specific property belonging to the joint family or his undivided interest in such property, that property may, at a partition between the coparceners be allotted to another coparcener subject to the mortgage (as a part of the partition arrangement) or the latter takes the property free from the mortgage. In the former case the other coparceners have in effect obtained the equity of redemption only and are liable in the first place to the mortgagee who may sue them on the mortgage (*e*). In the latter case the mortgagee is entitled to recover his claim out of the substituted property which falls to the share of the mortgagor at the partition unless the partition is unfair and in fraud of the mortgagee (*f*); and may follow it in the hands of a subsequent transferee unless the transfer is shown to be without notice (*g*). In a proper case the partition may be reopened (*h*).

264. Renunciation by coparcener of his share.—(*1*) A coparcener may renounce his interest in the coparcenary property in favour of the other coparceners as a body but not in favour of one or more of them (*i*). If he renounces in favour of one or more of them the renunciation enures for the benefit of all other coparceners and not for the sole benefit of the coparcener or coparceners in whose favour the renunciation is made (*j*).

(*2*) In a Bombay case, it was held that where *X* has two sons *A* and *B* and *A* has a son *C*, and *B* has a son *D*, a release by *A* of his interest in the coparcenary property in favour of his father X enures for the benefit of all the other coparceners *including* *A*'s son *C* (*k*). In a later Bombay case, the facts were these : *A* had two sons *B* and *C*. *C* had a son

(*d*) *Sree Rajah Vasi Reddi Balachandrasekhara Varaprasad Bahadur Manne Sultan Garu* v. *Lakshmi Narasimham & Ors.* (1910) Mad. 913, ('40) A.M. 691.

(*e*) *Atmaram Rao* v. *Bhupandranath* (1941) Nag. 677, 194 I.C. 537, ('40) A.N. 149 (1940) M.L.J. 365.

(*f*) *Mathia* v. *Appala* (1911) 34 Mad. 175, 6 I.C 991; *Bujnath Lall* v. *Ramoodeen* (1873) 1 I.A. 106, 21 W. R. 233; *Hem Chunder* v. *Thako Moni* (1893) 20 Cal. 533; *Shahebzada* v. *Hills* (1908) 35 Cal. 388; *Amolak* v. *Chandan* (1902) 24 All. 483; *Nagendra* v. *Pyari Mohan* (1916) 43 Cal. 103, 30 I. C. 420, ('15) A.C. 330.

(*g*) *Kharag Narain* v. *Janki Rai* (1937) 16 Pat. 230, 169 I.C. 906, ('37) A.P. 546.

(*h*) *Lakshman* v. *Gopal* (1899) 23 Bom. 385.

(*i*) *Peddayya* v. *Ramalingam* (1888) 11 Mad. 406. But see *Sudarsanam* v. *Narsimhulu* (1902) 25 Mad 149, 156, and compare *Appa* v. *Ranga* (1883) 6 Mad. 71, where there was no renunciation in fact.

(*j*) *Chandur* v. *Dampat* (1894) 16 All. 369; *Anandarao* v. *Vasantha Rao* 17 M L.J. 184 (P.C.); *Subbanna* v. *Balasubba Reddi* (1945) Mad. 610 (F B.).

(*k*) *Wasantrao* v. *Anandrao* (1904) 6 Bom. L. R. 925, 947, affirmed on appeal to the P.C. sub nomine *Anandrao* v. *Vasantrao* (1907) 9 Bom. L. R. 595. See *Shivajirao* v. *Vasantrao* (1909) 33 Bom. 267, 2 I. C. 219. Contrast *Periasami* v. *Periasami* (1878) 1 Mad. 312, 5 I. A. 61.

Ss. 264, 265 *D*. *C* was of weak intellect; he lived separately and his father allotted to him property X being part of the joint family properties for his maintenance. After *A*'s death, *B* entered into possession of properties Y and Z being the rest of the joint family properties. Afterwards *D* sued his uncle *B* and his father *C* for partition. *C* died pending the suit. It was held that all the three properties should be thrown into hotchpotch and divided equally between *B* and *D* (*l*). Both these decisions were affirmed on appeal by the Judicial Committee. No assignment of a cosharer's interest in actionable claims is necessary when he retires from the membership of the family business and renounces his share therein (*m*).

Illustration of sub-sec. (1).

A, *B*, *C* and *D*, four Hindu brothers, are members of a joint family. *A* and *B* execute a writing renouncing their interest in the joint property in favour of *C* alone. Subsequently *C* sues *D* for partition of the joint property, and claims three-fourths of the property. According to the Madras High Court, *C* is entitled to three-fourths and *D* is entitled to one-fourth. According to the Allahabad High Court, the renunciation by *A* and *B*, though made in favour of *C* alone, enures for the benefit of both *C* and *D* and the property should be divided equally between *C* and *D*.

Surrender of share.- Manu says: "If any one of the brethren has a competence from his own occupation, and *desires not the* property, he may be debarred from his share by giving him a trifle in lieu of maintenance." Relying upon this passage, the High Court of Madras says that if a renunciation can be made in favour of the other coparceners as a body, there is no reason why it cannot be made in favour of one of them who alone may need such help.

265. Insolvency of manager, father or other coparcener.— (*1*) *Insolvency of manager not being the father of the other coparceners.* On the insolvency of the manager of a joint Hindu family governed by the Mitakshara law, there vest in the Official Assignee or Receiver -

(a) the separate property of the insolvent manager and his undivided interest in the joint family property; and

(b) under the Presidency-Towns Insolvency Act the power which the manager of a joint Hindu family has to alienate the entire joint family property including the interests of the minor coparceners for debts incurred on behalf of the family (*n*) [ill. (a)]. But under the Provincial Insolvency Act there is no provision to vest the right to sell joint family property in the Official Receiver (*o*). The following decision of

(*l*) *Mukund* v. *Balkrishna* (1927) 54 I.A. 413, 52 Bom. 8, 105 I.C. 703, ('27) A.PC. 224.

(*m*) *Brijmohan* v. *Mahabeer* (1936) 63 Cal. 194.

(*n*) *Rangayya* v. *Thanikachalla* (1896) 19 Mad. 74 [elder brother manager]; *Sardamal* v. *Aranrayal* (1897) 21 Bom. 205 [uncle manager], *Nunna* v. *Chidaraboyina* (1903) 26 Mad. 214 [eight uncles managers].

(*o*) *Nori Ramasastrulu* v. *Teluguntla Balkrishna Rao* (1943) Mad. 83, 203 I.C. 507, ('42) A.M. 682 (F.B.).

the Patna Court (*p*) may require reconsideration. The Calcutta High Court with great hesitation but having regard to the decisions existing at the time has held that such power vests in the Official Receiver, but subject to any restriction attaching to the property existing before it vests in the Official Assignee or Receiver (*q*). This case may also require consideration. S. 265

(*2*) *Insolvency of father.*—On the insolvency of the father of a joint Hindu family governed by the Mitakshara law, there vest in the Official Assignee or Receiver—

(a) The separate property of the insolvent father and his undivided interest in the joint family property ; and

(b) The power which the father has to alienate the joint family property including the interest of his sons therein for paying his antecedent debts not contracted for an immoral purpose. In cases governed by the Presidency-Towns Insolvency Act, 1909, this power vests in the Official Assignee under sec. 52 (*2*) of the Act (*r*). It does not pass by survivorship to the son and it may be exercised by the Official Assignee or by the Receiver after the father's death (*s*). As to cases governed by the Provincial Insolvency Act, 1920, a Full Bench of the Madras High Court has recently held relying on the Privy Council decision in *Sat Narain* v. *Sri Kishan* [in (*r*)] that the power does not vest in the receiver (*t*). The following decisions (*u*) of other courts were decided before the Privy Council decision and may have to be reconsidered. In one case (*v*) the Nagpur High Court referring to the Privy Council decision merely followed the former decisions of the High Courts.

(*p*) *Bhola Prasad* v. *Ramkumar* (1932) 11 Pat. 399, 139 I. C. 31, ('32) A.P. 231. As to the rights of the Official Assignee to sue on contracts entered into by the manager, see *Grey* v. *Walker* (1913) 40 Cal. 523, 18 I.C. 753.

(*q*) *Indu Bala Dasee* v. *Bakkeshwar Banerji* (1937) 2 Cal. 675, 172 I.C. 914, ('37) A.C. 517.

(*r*) *Official Assignee of Madras* v. *Ramchandra* (1923) 46 Mad. 54, 68 I.C. 898, ('23) A.M. 55 ; *Sellamuthu Servai, In re* (1924) 47 Mad. 87, 80 I.C. 108, ('24) A.M. 411 [F.B.] ; *Sat Narain* v. *Sri Kishen* (1936) 63 I.A. 384, (1936) 17 Lah. 644, 38 Bom. L.R 1129, 164 I.C. 6, ('36) A.PC. 277 ; *Balusami, In re* (1928) 51 Mad. 417, 112 I.C. 541, ('28) A.M. 735 [F.B.] ; (1903) 26 Mad. 214, *supra* [Indian Insolvent Act, 1848, s. 30].

(*s*) *Fakirchand* v. *Motichand* (1883) 7 Bom. 438 [Ind. I. Act, 1848, s. 7 applied].

(*t*) *Nori Ramasastrulu* v. *Teluguntla Balkrishna Rao & Ors.* (1943) Mad. 83, 203 I.C. 507, ('42) A.M. 682 [F.B.] ; *Virupaksha Reddi* v. *Chanalal Siva Reddi* (1944) Mad. 212.

(*u*) *Anand Prakash* v. *Narain Das* (1931) 53 All. 239, 135 I.C. 119, ('31) A.A. 162 [F.B.] ; *Bawan Das* v. *Chirne* (1922) 44 All. 316, 64 I.C. 976, ('22) A.A. 70 ; *Om Prakash* v. *Motiram* (1926) 48 All. 400, 94 I.C. 175, ('26) A.A. 447 ; *Ram Ghulam* v. *Kailash* (1930) 52 All. 493, 127 I.C. 584, ('31) A.A. 59 ; *Khemchand* v. *Narayandas* (1925) 6 Lah. 493, 89 I.C. 1022, ('26) A.L. 41 ; *Bishwanath Sao* v. *The Official Receiver* (1937) 16 Pat. 60 [F.B.], 167 I.C. 765, ('37) A.P. 185 ; *Jansa* v. *Ramkrishna* (1937) Nag. 512, 168 I.C. 895, ('37) A.N. 31 , *Siddheswar Nath* v. *Deokali Din* (1934) 9 Luck. 304, 147 I.C. 642, ('34) A.O. 1.

(*v*) *Laxminarayan* v. *Dinkar* (1943) Nag. 890, 205 I.C. 279, ('43) A.N. 101.

S. 265 In *Sat Narain's* case (*w*) which was a case under the Presidency-Towns Insolvency Act, it was held that the interest of the son did not vest in the Official Assignee, although under sec. 52 (*2*) of that Act, or in some other way, the entire joint family property including the son's interest therein may be made available for the payment of his personal debts.

(c) As the interest of the son does not vest in the Official Assignee or Receiver, it may be attached even after the insolvency of the father by a creditor of the father in execution of a decree obtained by him against the father or against the father and son in respect of a personal debt of the father, unless it has been previously sold by the Official Assignee or Receiver, and leave of the Insolvency Court is not necessary for attaching the son's shares (*x*). *After* attachment the Official Assignee or Receiver cannot exercise the power of sale as the father himself could not have done so [ill. (b)]; see s. 295 (*5*). Where the son's share is attached after the insolvency of the father, the proper procedure is to carry out execution proceedings in combination with the Official Assignee or Receiver so that the entire property may be sold at the same time to the benefit both of the attaching creditor and the father's creditors (*y*).

(d) As in the case of the father, so in the case of the Official Assignee and Receiver, the power to sell the son's share for paying the father's debts subsists if at all only so long as the family remains joint. *After* partition the Official Assignee or Receiver cannot sell the son's interest as the father himself could not have done so [s. 295 (*4*)]. It has accordingly been held that if the son sues the father for partition of joint family property pending the insolvency of the father, the Official Assignee of Receiver cannot sell the son's share. The institution of a suit for partition puts an end to the joint family status [s. 325 (*1*)] and with it, to the right also of the father to sell his son's share for his debts, and as a result, extinguishes the right (even if it can pass otherwise) also of the Official Assignee or Receiver to sell the son's share for the father's

(*w*) (1925) 52 I.A. 22, 6 Lah. 1, 84 I.C. 883, ('25) A.PC. 18, reversing (1922) 3 Lah. 329, 69 I.C. 486, ('23) A.L. 1 [F.B.].

(*x*) *Arunachalam* v. *Sabaratnam* (1939) Mad.585.

(*y*) (1926) 48 All. 343, 92 I.C. 309, ('26) A.A. 262, *supra* [Prov. I. Act]; (1925) 49 Bom. 785, 89 I.C. 996, ('25) A.B. 416, *supra*.

debts (*z*). But though the Official Assignee or Receiver cannot *sell* the son's share after the institution of a suit for partition, he can institute a suit against the son for realizing debts due to the father's creditors and enforce the decree in such suit by selling the son's share or he may apply to be joined as a party in the son's suit for partition and by proper procedure can obtain a decree which he can execute against the son's share (*a*) (ill. (c)]. S. 265

(3) *Insolvency of other coparceners.*—On the insolvency of any other coparcener, his separate property and his interest in the joint family property rest in the Official Assignee or Receiver and are available for the benefit of his personal creditors (*b*). But the creditors of the insolvent's father are not entitled to priority over those of the insolvent (*c*). The purchaser of the undivided interest of the insolvent coparcener from the Official Assignee is like any other private purchaser and is not entitled to mesne profits prior to a suit for partition (*d*).

Illustrations.

(a) *A*, his minor son *S*, and his minor brother *B*, constitute a joint family. *A* is the manager of the family. *A* is adjudged an insolvent on the petition of his personal creditors as well as creditors of the joint family business. The Official Assignee sells a house belonging to the family to *J*, including the interests of *S* and *B* therein. The sale will pass the interest of *S*, if the personal debts contracted by *A* were not for an immoral purpose, the reason being that a father has the power to dispose of his son's interest in joint family property for the payment of his debts not contracted for immoral purposes, and this power vests in the Official Assignee on the insolvency of the father. The sale also passes the interest of *B* in the house, the reason being that the manager of a joint family has power to alienate the family property including the interest of minor coparceners therein for family purposes, and this power vests in the Official Assignee on the insolvency of the manager; see *Rangayya* v. *Thanikachalla* (1896) 19 Mad. 74 ; *Nunna* v. *Chidaraboyina* (1902) 26 Mad. 214 ; *Official Assignee of Madras* v. *Ramchandra* (1923) 46 Mad. 54, 68 I.C. 898, ('23) A.M. 55.

(b) *A* and his son constitute a joint Hindu family. *A* is adjudged an insolvent on the petition of his personal creditors, and a Receiver is appointed of his property. The family owns five immoveable properties of which two are sold by the Receiver. Afterwards one of *A*'s personal creditors who had obtained a decree against *A* and his son attaches the son's share in the remaining three properties in execution of the decree. The attachment is valid and the creditor is entitled to sell the son's share in those

(*z*) *Balusami Ayyar, In re* (1928) 51 Mad. 417, 112 I.C. 511, ('28) A.M. 735 [F.B.]; *Krishnamurthy* v. *Sundaramurthy* (1932) 55 Mad. 558, 138 I.C. 225, ('32) A.M. 381 ; *Sat Narain* v. *Sri Kishen Das* 63 I.A. 384, 17 Lah. 644, 38 Bom. L.R. 1129, 164 I.C. 6, ('36) A.PC. 277. This case overrules the contrary decision of the Full Bench of the Allahabad High Court, in *Bankey Lal* v. *Durga Prasad* 53 All. 868, 135 I.C. 139, ('31) A.A. 512, on this point.

(*a*) (1927) 51 Mad. 417, 443, 467-468, 112 I.C. 541, ('28) A.M. 735 [F.B], *supra*.

(*b*) *Nunna* v. *Chidaraboyina* (1903) 26 Mad. 214, 221 ; *Lakshmanan Chettiar* v. *Srinivasa Iyengar* (1937) Mad. 203, 166 I.C. 378, ('37) A.M. 131.

(*c*) *Pr. N. Sm. Chockalingam Chettiar* v. *Official Assignee of Madras* (1943) Mad. 603, 206 I.C. 482, 69 I.A. 158, ('43) A.PC. 15.

(*d*) *Venkatarayudu* v. *Sivaramakrishnayya* (1935) 58 Mad. 126, 153 I.C. 368, ('34) A.M. 676.

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properties in execution of his decree and apply the sale proceeds in payment of the judgment debt. The Receiver has no right after the attachment to sell the son's share in those properties for the benefit of the general body of *A*'s creditors (*d1*).

(c) *A* and his sons constitute a joint Hindu family. *A* is adjudged an insolvent on the petition of his personal creditors, and his property vests in the Official Assignee. Pending *A*'s insolvency *A*'s sons institute a suit against *A* for partition of the joint family properties. The Official Assignee cannot, after the institution of the suit, *sell* the son's shares in the joint family properties, though he may seize them in execution of a decree that he may obtain against them in a regular *suit* to be filed by him against the sons in respect of the father's debts: *Balusami Ayyar, In re* (1928) 51 Mad. 417, 112 I.C. 541, ('28) A.M. 735 [F.B.]. If the Official Assignee or Receiver himself files a suit for partition against the sons after the insolvency of the father, and allows a decree to be passed allotting separate shares to the sons, and the sons take possession of their shares, he cannot afterwards apply to sell those shares for the benefit of the father's creditors: *Tryamkeshar* v. *Babu Basant* (1930) 5 Luck. 248, 123 I.C. 61, ('30) A.O. 36.

Insolvency Acts—See Indian Insolvent Act, 11 and 12 Vict., c. 21, ss. 7 and 30 [repealed]; Presidency-Towns Insolvency Act, 1909, s. 2 (e), and ss. 17, 23 and 52; and Provincial Insolvency Act, 1920, s. 2 (d), and ss. 28 and 37.

Joint Possession.—According to the Madras High Court the Official Assignee is entitled, on the insolvency of any coparcener, to joint possession with the other coparceners (*e*). [Contrast s. 261].

Sat Narain v. Behari Lal (*f*).—In order to understand the exact point of the decision in *Sat Narain*'s case, it is important to note the relevant sections of the various enactments relating to the law of Insolvency in India. Under section 7 of the Indian Insolvent Act, 1848, "all the real and personal estate and effects" of the insolvent, and all his "future estate right, title, interest and trust" in or to any real or personal estate or effects vest in the Official Assignee. Section 30 of the Act provides that all "powers" vested in the Insolvent which he might lawfully execute for his benefit shall be vested in the Official Assignee. S. 17 of the Presidency-Towns Insolvency Act and s. 28 (*2*) of the Provincial Insolvency Act correspond with s. 7 of the Indian Insolvent Act. S. 52(*2*)(b) of the Presidency-Towns Insolvency Act corresponds with s. 30 of the Indian Insolvent Act. There is no such section in the Provincial Insolvency Act. S. 2(e) of the Presidency-Towns Insolvency Act defines "property" as including "any property over which or the profits of which any person has a disposing power which he may exercise for his own benefit." S. 2(*1*) (d) of the Provincial Insolvency Act defines "property" in exactly the same terms. Prior to the decision in *Sat Narain*'s case there was a conflict of opinion in India whether on the insolvency of a Hindu father *the share itself* of his son vested in the Official Assignee for the benefit of the general body of the father's creditors or merely the power which the father has of selling the joint family property for the payment of his antecedent debts not tainted with immorality. The High Court of Bombay in a case under the Indian Insolvent Act held that the son's share itself vested in the Official Assignee (*g*). The High Court of Madras, however, held in cases under that Act and the Presidency-Towns and Provincial Insolvency Acts, that there is no vesting of the son's share but a vesting merely of the power to sell (*h*). In *Sat Narain*'s case the Judicial Committee held that the share itself of the son did not vest in the

(*d1*) *Gopalakrishnayya* v. *Gopalan* (1928) 51 Mad. 312, ('28) A.M. 479. The decision is not correct with respect to the first two items.

(*e*) *Official Assignee* v. *Ramchandra* (1923) 46 Mad. 54, 68 I.C. 898, ('23) A.M. 55; *Venkatram* v. *Chokkier* (1928) 51 Mad. 567, 109 I.C. 516, ('28) A.M. 531.

(*f*) (1925) 52 I.A. 22, 6 Lah. 1, 84 I.C. 883, ('25) A.PC. 18, reversing *Beharilal* v. *Sat Narain* (1922) 3 Lah. 329, 69 I.C. 486, ('23) A.L.1.

(*g*) *Fakrichand* v. *Motichand* (1883) 7 Bom. 438.

(*h*) *Nunna* v. *Chidaraboyina* (1903) 26 Mad. 214 [Ind. I. Act]; *Official Assignee, Madras* v. *Ramchandra* (1923) 46 Mad. 54, 68 I.C. 898, ('23) A.M. 55 [Pr. T.I. Act]; *Sellamuthu, In re* (1924) 47 Mad. 87, 80 I.C. 108, ('24) A.M. 411 [F.B.] [Pr T.I. Act]; *Sunkaranarayan* v. *Rajamani* (1924) 47 Mad. 462, 83 I.C. 196, ('24) A.M. 550 [Prov. I. Act].

Official Assignee, observing at the same time that the joint family property might be made available for the payment of the father's debts under s. 52 (2) of the Presidency-Towns Insolvency Act. As to cases in which it was held that upon the insolvency of the father the share itself of the son vested in the Official Assignee, their Lordships at p. 27 said as follows :--

"That means that when a Hindu, who happens with his sons to constitute a joint family subject to the law of the Mitakshara, is adjudged an insolvent under the Presidency-Towns Insolvency Act, 1909, not only his own rights but all the rights and interests of his sons who are his coparceners in joint family property vest in the Official Assignee by virtue of the adjudication alone. That is a startling proposition."

And later on at p. 33 their Lordships said :—

"If their Lordships had to construe s. 7 of the 11 and 12 Vict., c. 21, they would doubt that the Imperial Parliament sitting at Westminster in passing the 11 and 12 Vict., c. 21, ever contemplated or intended that 'the real and personal estate of such petitioner' which a court might order to be vested in an Official Assignee, or a right to sell it for the debts of a Hindu father, might be held to include or should include the unpartitioned separate interest of a Hindu coparcener, who was not a petitioner, in the immoveable property of a joint family."

The point for decision in *Sat Narain's* case was whether on the insolvency of a father of a joint Hindu family, his son was entitled to maintain a suit for pre-emption with respect to a certain house which belonged to the joint family as "owner" of a contiguous and dominant tenement. If in addition to the father's interest in the tenement the son's interest also vested in the Official Assignee under the Presidency-Towns Insolvency Act, the son could not be regarded as an owner of the tenement and he would not therefore be entitled to maintain the suit. But he would be so entitled if his interest did not vest in the Official Assignee. Their Lordships of the Privy Council held that the son's interest did not vest in the Official Assignee and that the son was entitled to maintain the suit. The ground of the decision was that the only property that vested in the Official Assignee was the "property" of the insolvent, and that the son's interest was not the "property" of the insolvent father within the meaning of s. 2 (d) of the Act, as the wording of that section contemplated only an "absolute and unconditional power of disposal," which a father's power is not, as it depends upon the existence of debts liable to be satisfied out of the son's share.

But though the son's interest in joint family property may not be the "property" of the insolvent father within the meaning of the Presidency-Towns Insolvency Act and may not therefore vest in the Official Assignee, the question still remains whether *the capacity to exercise the power* which the father of a joint family has to alienate the whole coparcenary property including his son's interest therein for payment of his antecedent debts vests on his insolvency in the Official Assignee. The answer to this question depends on a consideration of s. 17 and s. 52 (2) (b) of the Presidency-Towns Insolvency Act. Under s. 17 when a person is adjudicated insolvent, his "property" vests in the Official Assignee and becomes divisible among his creditors. S. 52 (2) (b) declares that "the property of the insolvent" shall comprise the following particulars, namely, "the capacity to exercise and to take proceedings for exercising all such powers in or over or in respect of property as might have been exercised by the insolvent *for his own benefit* at the commencement of his insolvency or before his discharge." The combined effect of these two sections is that on the insolvency of the father of a joint Hindu family, the capacity which the father has to exercise the power to alienate the whole coparcenary property including his son's interest therein for payment of his antecedent debts not incurred for illegal or immoral purposes vests in the Official Assignee. It has accordingly been held by the Privy Council that when at the commencement of his insolvency a

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father has the power to enforce by sale of the whole joint family estate the pious obligations of his sons to discharge out of their interest his then existing untainted antecedent debts, the capacity to exercise that power *for the benefit of the insolvent* vests in the Official Assignee after adjudication, whatever may be the technical effect of the adjudication upon the coparcenary in other respects. The Official Assignee, therefore, may sell the *whole* coparcenary property, as he could have done before the decision in *Sat Narain's* case, for payment of such debts (*i*). The Provincial Insolvency Act, however, does not contain any provision corresponding to sec. 52 (2) (b) of the Presidency-Towns Insolvency Act.

Summary.—To sum up, the position appears to be that the Privy Council have held (1) that on the adjudication of the father the interest of the son in the joint family property does not vest in the Official Assignee, but (2) that the father's power to sell the son's interest in the joint family property for debts which are not immoral or illegal can be exercised by the Official Assignee. Both the Privy Council decisions were under the Presidency-Towns Insolvency Act, but as their Lordships in the later case approved of the decisions under the Provincial Insolvency Act, the same view would probably be taken by the Privy Council under that Act.

(*4*) Two or more members of a joint family may be adjudicated insolvents on a single petition if they are liable on a joint debt and have committed a joint act of insolvency, but the joint family as such cannot be adjudicated insolvent (*j*).

266. Joint family firm—Minor—Insolvency.—A minor member of a joint family firm cannot as such be adjudged an insolvent (*k*).

A Hindu dies leaving a business. On his death the business descends to his five sons, *A*, *B*, *C*, *D* and *E*. *E* is a minor. The firm is unable to pay its debts. *A*, *B*, *C* and *D* may be adjudged insolvents, but not *E*, as *E* is a minor. This proceeds on the rule of English as well as Indian law that an infant *partner* cannot be adjudicated an insolvent (*l*). But though *E* cannot be adjudged an insolvent, the Official Assignee succeeds on the insolvency of *A*, *B*, *C* and *D*, the managing members of the joint family firm, to the right of a manager to alienate the joint family property including the share of minor coparceners for the payment of debts incurred in the course of the business (*m*).

The above observations apply only to an *ancestral* business. A different rule applies when a *new* business is started by the adult members of a joint family after the death of the ancestor. In such a case the matter rests purely on *contract* with the result that on the insolvency of *A*, *B*, *C* and *D*, the Official Assignee does not succeed to the rights of a manager of a joint family firm, but gets a right merely to recover the minor's share for the benefit of the creditors of the *partnership*, if the minor was admitted to the benefits of the partnership within the meaning of sec. 247 of the Contract Act (*n*).

(*i*) *Sat Narain* v. *Sri Kishen Das* (1926) 7 Lah. 376, 89 I.C. 996, ('25) A.L. 416; *Balusami Ayyar, In re* (1928) 51 Mad. 417, 112 I.C. 541, ('28) A.M. 735 [F.B.].

(*j*) *Mahabir Prasad Paddar* v. *Ram Tahal Mandar* (1937) 16 Pat. 724, 172 I.C. 737, ('37) A.P. 665; *Poholo Mal* v. *Basant Ram* I.L.R. 1941 Lah. 55, 92 I.C. 532.

(*k*) *Sanyasi Charan* v. *Asutosh* (1915) 42 Cal. 225, 26 I.C. 836, ('15) A.C. 482; *Hansraj Malhi, In re* (1883) 7 Bom. 411, 413. See also *Nobodeep Chunder, In re* (1880) 13 Cal. 68.

(*l*) (1915) 42 Cal. 225, 26 I.C. 836, ('15) A.C. 482, *supra*.

(*m*) *Nunna* v. *Chidaraboyina* (1903) 26 Mad. 214, but see 42 Cal. 225, 233-240, 26 I.C. 836, ('15) A.C. 482, *supra*. *Mt. Champa* v. *Official Receiver, Karachi* (1934) 15 Lah. 9, 144 I.C. 636, ('33) A.L. 901; *Bhola Prasad* v. *Ramkumar Marwari* (1932) 11 Pat. 309, 139 I.C. 31, ('32) A.P. 231.

(*n*) *Sanyasi Charan* v. *Krishnadhan* (1922) 49 I.A. 108, 49 Cal. 560, 67 I.C. 124, ('22) A.PC. 237 [business not ancestral but new—case governed by Contract Act, s. 247 and decided under that section].

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It is well established that a minor cannot be a *partner*, but he may be admitted to the benefits of a partnership between the adult members in respect of a *new* business started by them, in which case the minor's share in the property of the firm is liable for the obligations of the firm. See notes to sec. 234, "New business," at p. 266.

VI.—SETTING ASIDE ALIENATIONS.

267. Setting aside gifts.—A coparcener, according to the Mitakshara law, cannot make a gift of the coparcenary property, not even of his own interest in the property [s. 258]. Therefore, where such a gift is made, and it is objected to by the other coparceners, the Court will set aside the gift *in its entirety*. The gift is not valid even to the extent of the donor's interest in the property [s. 270, sub-sec. (*1*), ill. (a)].

The above rule does not apply to gifts by a *father* of ancestral property to the extent mentioned in secs. 225 and 226.

268. Setting aside sales and mortgages—Bombay, Madras and the Central Provinces.—(*1*) Where a member of a joint family governed by the Mitakshara law as administered in the Bombay and Madras Presidencies sells or mortgages *more than his own interest* in the joint family property, the alienation not being one for legal necessity [s. 242] or for payment by a father of an antecedent debt [s. 295], the other members or persons to whom their interests in the property have passed (*o*), are entitled to have the alienation set aside *to the extent of their own interests therein* (*p*). The alienation cannot be set aside in its entirety, for according to the law as prevailing in Bombay and Madras, a coparcener can alienate *his own interest* in the joint property. If any coparcener has consented to the alienation, the alienation will bind his interest also [s. 242 (*3*)].

(*2*) *Equities on setting aside alienations.*—Where an alienation is not for legal necessity or for payment of an antecedent debt, and it is set aside at the instance of the other coparceners as regards their shares, there is no equity entitling the alienee to a refund of a proportionate part of the purchase-money in respect of those shares (*q*). And it has been held that even if a suit is brought by the *sons* for a partition and for setting aside an alienation made by their father, the sons are not, as a condition to recovering their share of the property, under a pious obligation to refund to the alienee their share of the consideration received by the father. The

(*o*) *Alla Venkataramanna* v. *Palarherla Mangamma* (1944) Mad. 867.

(*p*) *Marappa* v. *Rangasami* (1900) 23 Mad. 89; *Naro* v. *Paragowda* (1917) 19 Bom. L.R. 69; 39 I.C. 23, ('16) A.B. 130; *Ramappa* v *Yellappa* (1928) 52 Bom. 307, 109 I.C. 532, ('28) A.B. 150.

(*q*) *Virabadra* v. *Gururenkata* (1899) 22 Mad. 312.

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ground of the decision is that the pious obligation to pay the father's debts attaches only to a debt existing *at the date of the suit*, and that the consideration received by the father from the alienee is not in the first instance a *debt* due from the father; it becomes a debt only when the alienation is set aside and a decree is obtained by the alienee against the father for failure of consideration (*r*). [See the cases cited in sec. 269 (*2*)].

Equities on setting aside alienations.—The rule that a coparcener cannot make a *gift* of his share cannot be evaded by making a sale at a grossly inadequate price (*s*). As to how the equities should be worked out if the transaction amounts in effect to a gift, see the undermentioned case (*t*).

Improvements made by alienee.—See sec. 185 [Equities on setting aside alienation by widow], and the undermentioned case (*u*).

Mesne profits on setting aside alienation.—Where an alienation is set aside under this section, and the purchaser is in possession, he may be required to pay mesne profits from the date on which the sale is repudiated by the other coparceners, but not from the date of sale, the sale being valid until it is repudiated (*v*).

269. Setting aside sales and mortgages—Other Provinces.—(*1*) Where a member of a joint family governed by the Mitakshara law as administered in Bengal and the United Provinces sells or mortgages the joint family property or *any portion* thereof without the consent of his coparceners, the alienation is liable to be set aside wholly unless it was for legal necessity [s. 242], or for payment by a father of an antecedent debt [s. 295], and it does not pass the share even of the alienating coparcener. The result is that if the alienation is neither for legal necessity nor for the payment of an antecedent debt, the other coparceners are entitled to a declaration that the alienation is void *in its entirety* (*w*). Even

(*r*) *Srinivasa* v. *Kuppuswami* (1921) 44 Mad. 801 64 I.C. 698 ('21) A.M. 447; *Polavarapa, Lingayya & Ors.* v. *Vupputusi Punnayya & Ors.* (1942) Mad. 502, 198 I.C. 588, ('42) A.M. 183, [F.B.]

(*s*) *Rottala* v. *Pulicat* (1904) 27 Mad. 162; *Venkatapathi* v. *Pappia* (1928) 51 Mad. 824, 113 I.C. 158, ('28) A.M. 788.

(*t*) (1928) 51 Mad. 824, 113 I.C. 158, ('28) A.M. 788, *supra*.

(*u*) *Ramappa* v. *Yellappa* (1928) 52 Bom. 307, 109 I.C. 532, ('28) A.B. 150.

(*v*) *Ramasami* v. *Venkatarama* (1923) 46 Mad. 815, 822, 75 I.C. 406, ('24) A.M. 81; *Gangabisan* v. *Vallabhdas* (1924) 48 Bom. 428, 432, 87 I.C. 703, ('24) A.B. 433.

(*w*) *Sadabart Prasad* v. *Foolbash Koer* (1860) 3 Beng. L.R. [F. B.] 31 [mortgage]; *Madho Parshad* v. *Merhban Singh* (1891) 18 Cal. 157, 17 I.A. 194 [sale]; *Balgobind Das* v. *Narain Lal* (1893) 15 All. 339, 20 I.A. 116 [mortgage]; *Chandradeo* v. *Mata Prasad* (1909) 31 All. 176, 208, 1 I.C. 479 [F.B.] [mortgage]; *Kali Shankar* v. *Nawab Singh* (1909) 31 All. 507, 3 I.C. 909 [mortgage]; *Narain Prasad* v. *Sarnam Singh* (1917) 44 I.A. 163, 39 All. 500, 40 I.C. 284, ('17) A.PC. 41 [mortgage]; *Anant Ram* v. *Collector of Etah* (1918) 40 All. 171, 44 I.C. 290, ('17) A.PC. 188 [mortgage]; *Sahu Ram* v. *Bhup Singh* (1917) 44 I.A. 126, 39 All. 437, 39 I.C. 280, ('17) A.PC. 61 [mortgage]; *Manna Lal* v. *Karu Singh* (1920) 1 Pat. L.J. 6, 56 I.C. 766, ('19) A.PC. 108 [mortgage]; *Ram Sahai* v. *Parbhu Dayal* (1921) 43 All. 655, 63 I.C. 358, ('21) A.A. 137 [sale]; *Badam* v. *Madho Ram* (1921) 2 Lah. 338; 66 I.C. 19, ('22) A.L. 241 [sale by father]; *Daya Ram* v. *Harcharan Das* (1927) 8 Lah. 678, 107 I.C. 781, ('28) A.L. 111 [sale by father]; *Amar Dayal* v. *Har Pershad* (1920) 5 Pat. L.J. 605, 58 I.C. 72, ('20) A.PC. 433 [mortgage]; *Ram Bilas* v. *Ramyad* (1920) 5 Pat. L.J. 622, 58 I.C. 303, ('20) A.P. 441 [mortgage]; *Mathura* v. *Rajkumar* (1921) 6 Pat. L.J. 526, 62 I.C. 132, ('21) A.P. 447 [F.B.] [mortgage]; *Angraj* v. *Ram Rup* (1931) 6 Luck. 158, 127 I.C. 38, ('30) A.O. 284 [suit for possession by mortgagee]; *Malak Chand* v. *Hira Lal* (1936) 11 Luck. 449, 157 I.C. 945, ('35) A.O. 510.

in the Punjab where by custom a son cannot claim partition against the father, the son is entitled to joint possession with the father when the alienation is set aside (*x*). See sec. 260 above. **S. 269**

It has been held in Allahabad and Patna that the alienation can be impeached only by a coparcener other than the alienating coparcener or by a transferee who has acquired the interest of the entire joint family in the property alienated (*y*). The power of avoidance in such a transferee cannot be greater than that of the coparcenary body at the time of the transfer (*z*).

(2) *Equities on setting aside alienations.*—Where in Bengal and the United Provinces an alienation is set aside in its entirety, the question often arises whether the alienee is entitled to any equity or charge on the alienor's share for the consideration paid by him to the alienor. It has been held by the Judicial Committee that he is not (*a*), except perhaps in special circumstances such as those which existed in *Mahabeer Persad* v. *Ramyad* (*b*). In that case the High Court of Bengal declared a charge on the shares of the mortgagors (being the father and his eldest son) in favour of the mortgagee on the ground that they had represented to him that they had power to charge the joint family property which, in fact they had not [ills. (1) and (3)]. And it has been held by the same tribunal that even where such circumstances exist, the equity (if any) arising out of them cannot be enforced where the coparcener who made the alienation is dead and his share has passed by survivorship to the other coparceners, such as nephews, who are not liable for the personal debts and obligations of the deceased (*c*). They take the share of the deceased

(*x*) *Raj Kishore* v. *Madan Gopal* (1932) 13 Lah. 491, 143 I.C. 249, ('32) A.L. 636.

(*y*) *Madan Lal* v. *Gajendralal* (1929) 51 All. 575, 580, 116 I.C. 436, ('29) A.A. 243; *Madan Lal* v. *Chiddu* (1931) 53 All. 21; 23-26, 128 I.C. 829, ('30) A.A. 852; *Kharag Narayan* v. *Janki Rai* (1937) 16 Pat. 230, 169 I.C. 906, ('37) A.P. 546; *Shyam Behari Singh* v. *Raneshwar Prasad Sahu* (1941) 20 Pat. 904, 198 I.C. 208 ('42) A.P. 213.

(*z*) *Chandradeo* v. *Mata Prasad* (1909) 31 All. 176, 1 I.C. 479.

(*a*) *Narain Prasad* v. *Sarnam Singh* (1917) 44 I.A. 163, 39 All. 500, 40 I.C. 284, ('17) A.PC. 41 [mortgage]; *Anant Ram* v. *Collector of Etah* (1918) 40 All. 171, 176, 44 I.C. 290, ('17) A.PC. 188, followed in *Ram Sahai* v. *Parbhu Dayal* (1921) 43 All. 655, 63 I.C. 358, ('21) A.A. 137; *Amar Dayal* v. *Har Pershad* (1920) 5 Pat. L.J. 605, 58 I.C. 72, ('20) A.P. 433.

(*b*) (1874) 12 Beng. L.R. 90, as explained in *Madho Parshad*'s case (1890) 18 Cal. 157, 160, 17 I.A. 194, and *Narain Prasad*'s case (1917) 44 I.A. 163, 164, 165, 39 All. 500, 504, 40 I.C. 284, ('17) A.PC. 41; *Mahabeer Persad*'s case was followed in *Jamuna* v. *Ganga* (1892) 19 Cal. 401, 410, where the alienation was impeached by a *stranger to the family* who had succeeded to the rights of all the coparceners including a coparcener who had not consented to the alienation. See also (1920) 5 Pat. L.J. 605, 58 I.C. 72, ('20) A.P. 433, *supra*.

(*c*) *Madho Pershad* v. *Meherban Singh* (1890) 18 Cal. 157, 17 I.A. 194.

S. 269 in their right by survivorship, and are not affected by any such equity [ill. (2)].

There is a conflict of opinion whether where a sale is effected by the father, and the suit is brought by the sons in their father's lifetime to set aside the sale, the sale not being one either for legal necessity or for the payment of an antecedent debt, the sons are entitled to a decree without refunding the whole or any part of the purchase money to the purchaser. The High Court of Calcutta has held that they are not entitled to a decree without refunding the whole of the purchase money, the reason given being that immediately the sale is set aside, the purchaser would be entitled to recover the whole of the purchase money from the father, and it would thus become a *debt* due by the father for which the whole of the joint family property, including the property sold, would be liable by reason of the son's pious obligation to discharge the father's debt, unless it was contracted for an immoral purpose (*d*). This view has been dissented from by the High Courts of Lahore (*e*), Madras (*f*) and Allahabad (*g*). It has been held by those Courts that the pious obligation to pay the father's debt does not attach except to a debt existing *at the date of the suit*, and the price received by the father from the purchaser is in no sense a debt owing by him to the purchaser. It becomes a debt only when the sale is set aside by the Court, for it is only then that the purchaser is entitled to a refund of the price for failure of consideration. It has accordingly been held by those Courts, that the sons are not, as a condition to recovering the property, under a pious obligation to refund any portion of the purchase money, and the sale must be set aside unconditionally.

(*3*) An alienation which does not bind the share of the alienor himself cannot bind the share of a coparcener consenting thereto [s. 242 (*3*)].

Illustrations.

(1) *A* and his son *B* are members of a joint family governed by the Mitakshara law as administered in Allahabad. *B* mortgages his half share to *M* for his own personal benefit without *A*'s consent and without legal necessity. *M* sues *A* and *B* for a decree for

(*d*) *Koer Hasmat Rai* v. *Sunder Das* (1885) 11 Cal. 396. But see *Modhoo Dayal Singh* v. *Golbur Singh* (1868) 9 W.R. 511.

(*e*) *Daya Ram* v. *Harcharan Das* (1927) 8 Lah. 678, 99 I.C. 666, ('28) A.L. 111; *Badam* v. *Madho Ram* (1921) 2 Lah. 338, 66 I.C. 19, ('22) A.L. 241.

(*f*) *Srinivasa* v. *Kuppuswami* (1921) 44 Mad. 801, 64 I.C. 698, ('21) A.M. 447.

(*g*) *Madan Gopal* v. *Sati Prasad* (1917) 39 All. 485, 40 I.C. 451, ('17) A.A. 326; *Chandradeo* v. *Mata Prasad* (1909) 31 All. 176, 1 I.C. 479.

sale on the mortgage. The mortgage is void, and it cannot be enforced even against *B*'s share. But *M* may obtain a money decree against *B* personally, and attach and sell *B*'s interest in the property in execution of the decree: *Balgobind Das* v. *Narain Lal* (1893) 20 I.A. 116, 15 All. 339. [There were no special circumstances in this case to entitle *M* to a charge on *B*'s share for the money advanced by him to *B*.] **S. 269**

(2) *A* and his brother's son *B* are members of a joint family governed by the Mitakshara law as administered in Bengal. *A* sells his undivided interest in the joint family property to *P* for Rs. 10,000 without the consent of *B* and without legal necessity. Afterwards *A* dies, and his share passes by survivorship to his nephew *B*. After *A*'s death, *B* sues *P* to set aside the sale. The sale by *A*, though it was of his own share, is void and *B* is entitled to *A*'s share by *survivorship*. Even if there was any equity in *P*'s favour, *B* could not be affected by it. *B* takes *A*'s share in his own right by survivorship and is not liable for the personal debts of his uncle: *Madho Pershad* v. *Mehrban Singh* (1890) 17 I.A. 194, 18 Cal. 157.

(3) A joint family consists of three Hindu brothers and their sons, governed by the Mitakshara law as administered in Allahabad. The three brothers mortgage the joint family property without the consent of their sons and without legal necessity. The mortgage is void in its entirety. There being no special circumstances in the case, the mortgagee is not entitled to a charge even on the shares of the mortgagors in the property: *Narain Prasad* v. *Sarnam Singh* (1917) 44 I.A. 163, 39 All. 500, 40 I. C. 284, ('17) A.PC. 41.

Mahabeer Persad's case.—In *Mahabeer Persad* v. *Ramyad* (1878) 12 Beng. L.R. 90, the father and manager of a joint family governed by the Mitakshara mortgaged the family property to secure a loan of Rs. 3,000 obtained by him for his personal benefits. The mortgagor had two sons, one of whom was a minor. The older son had assented to the transaction. The elder son sued on his own behalf and on behalf of the minor to set aside the mortgage. The Court held—and this constituted the special feature of the case—that the father and the elder son had obtained the loan by representing that they had power to charge the joint family property, which they knew they did not possess. The mortgage was declared bad, but the learned judges who decided the case thought themselves at liberty to put a condition that, on recovery, the property be held and enjoyed by the family in defined shares, *viz.*, one-third belonging to the father, one-third to the elder son, and one-third to the minor, and that the shares of the father and of the elder son be jointly and severally subject to the lien thereon of the mortgagee for the repayment of the loan of Rs. 3,000 and interest thereon until repayment. By so doing, the Court in substance, ordered by its decree a partition of the property so that the separate shares to be obtained under the partition of the father and the elder son should be made available to meet the claim of the mortgagee. The line of reasoning adopted by the Court was that the father and the elder son were entitled at any moment to claim a partition, and having made the representation that they had power to charge the property, they were bound to make good the representation and that could be done by a partition. Upon this decision the Judicial Committee remarked: "There appears to be little substantial distinction between the law thus enunciated and that which has been established at Madras and Bombay; except that the application of the former may depend upon the view which the judges may take of the equities of the particular case whereas the latter establishes a broad and general rule defining the right of the creditor" (*h*). In *Madho Pershad*'s case (1890) 17 I.A. 194, 18 Cal. 157 [ill. (2)], Lord Watson declined to apply the rule in *Mahabeer Persad*'s case on the ground that no analogy existed between the latter case and the case before the Board. In the recent case of *Narain Persad* v. *Sarnam Singh* (1917) 44 I.A. 163, 165, 39 All. 500, 40 I.C. 284, ('17) A.PC. 41 [ill. (3)], the Judicial Committee appear to confine the applicability of

(*h*) *Deen Dayal* v. *Jugdeep Narain* (1877) 4 I A. 247, 255, 3 Cal. 198, 208.

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the rule in *Mahabeer Persad's* case to cases where an express representation has been made out. Their Lordships declined to hold that such a representation was to be implied in all cases, and observed: "Whether that particular case (*i.e.*, *Mahabeer Persad's* case) was rightly decided or not it is not necessary to consider here, because the learned judges proceeded upon the footing that there had been the representation referred to. On looking at the facts their Lordships agree with the observation of Mr. Parikh that there was very little, if any, evidence of such a representation, *but that there was such a representation was the basis of the judgment*, and unless, the learned judges had held that an equity arose out of it, their judgment would have amounted to this, that for every mortgage by the head of a joint family the property of the joint family could be made available to the extent of the interest of the mortgagor. Now whatever may happen when there are special circumstances, such as there were in the case referred to, that is not the general law." This decision was followed by the Judicial Committee in *Anant Ram* v. *Collector of Etah* (1918) 40 All. 171, 44 I.C. 290, ('17) A.PC. 188. The result is that the rule in *Mahabir Persad's* case can no longer be applied except in cases where special circumstances, such as an express representation, exist.

Lease.—A lease stands on the same footing as a sale or mortgage (*i*).

Mesne profits on setting aside alienation.—Where the purchaser from a coparcener has entered into possession, he may be required to pay mesne profits from the date of repudiation of the sale by the other coparceners (*j*).

270. Objections to alienations by coparceners existing (born or conceived) at the time of the alienation.—(*1*) Where an alienation is made by a coparcener *in excess of his powers*, it may be set aside to the extent mentioned in ss. 268 and 269 at the instance of any other coparcener who was *in existence* at the time of the completion of the alienation (*k*). It may also be set aside at the instance of any coparcener who, though born subsequent to the date of alienation, was *in his mother's womb* at the date of alienation; the reason is that under the Hindu law a son conceived is, in many respects, equal to a son born (*l*).

Illustrations.

(a) *A*, governed by the Mitakshara law, makes a *gift* of certain ancestral property to *B*. *A* has no son at the date of the gift, but a son is born to him two months later. The gift may be set aside at the instance of the son, as he was in his mother's womb at the date of the *gift*. The transaction being a *gift*, it will be set aside altogether, and not merely to the extent of the son's share [s. 267]: *Ramanna* v. *Venkata* (1888) 11 Mad. 246.

(b) *A*, governed by the Mitakshara law as applied in Madras, *sells* certain ancestral property to *B* without legal necessity. The sale may be set aside at the instance of a son who, though born subsequent to the date of sale, was in his mother's womb at the time of sale. It will not, however, be set aside altogether but to the extent only of the son's interest in the property [s. 268]: *Sabapathi* v. *Somasundaram* (1893) 16 Mad. 76.

(c) *A* and his son *B* are members of a joint family governed by the Mitakshara law. *A sells* certain ancestral property to *C* including *B's* interest therein, without *B's* consent to pay an antecedent debt of his not contracted for immoral or illegal purposes. The sale is valid in its entirety. It cannot be impeached by *B*, for it is made to pay his father's debts [s. 295]: see *Girdharee Lall* v. *Kanttoo Lall* (1874) 14 Beng. L.R. 187, 1 I.A. 321.

(*i*) *Jadu* v. *Abdul* (1911) 16 C.W.N. 93, 11 I.C 892.

(*j*) *Bhirgu Nath* v. *Narsingh* (1917) 39 All. 61, 35 I.C. 475, ('17) A.A. 479.

(*k*) *Ponnambala* v. *Sundarappayyar* (1897) 20 Mad. 354; *Narain Das* v. *Har Dayal* (1913) 35 All. 571, 21 I.C. 830.

(*l*) *Sabapathi* v. *Somasundaram* (1893) 16 Mad. 76 (sale); *Ramanna* v. *Venkata* (1888) 11 Mad. 246 [gift]; *Girdharee Lall* v. *Kanto Lall* (1874) 14 Beng. L.R. 187, 1 I.A. 321; *Deo Narain* v. *Ganga Singh* (1915) 37 All. 162, 26 I.C. 871, ('15) A.A. 65.

At the time of completion of the alienation.—See ill. (a) to sub-s. (2) below, and the note appended to the illustration. **S. 270**

Rights of a son in his mother's womb.—Under the Hindu law a son begotten (or conceived, or in his mother's womb) is equal, in many respects, to a son actually in existence. Thus a son in his mother's womb—and this also applies to a daughter—is entitled to *inheritance*, if born alive. He is also entitled to a share on *partition*. Further, he is entitled to take coparcenary property *by survivorship* as against a legatee of such property under his father's will. That is to say, just as a son living at the time of his father's death is entitled on his father's death to take coparcenary property by survivorship, so is a son who is in his mother's womb at the time of the father's death. The father cannot bequeath coparcenary property to a third person so as to defeat the son's right of survivorship whether the son was in existence at the time of his death or was in his mother's womb at the time [s. 256]. Lastly, an *alienation* that can be impeached by a son actually existing at the time of alienation can also be impeached by a son who was in his mother's womb at the time. There is, however, one case in which the Hindu law does not treat a son in his mother's womb as a son *in esse* and that is as regards *adoption*. Thus a father cannot adopt when he has a son *living*. But he can adopt though his wife is *pregnant* at the time of adoption and she is subsequently delivered of a son (*m*).

(2) *By after-born coparceners.*—An alienation of joint family property made by a father, there being no male issue in existence at the date of the alienation, is valid though made without legal necessity. Such an alienation cannot be objected to by a son born after the date of the alienation on the ground that it was made without legal necessity (*n*). But an alienation made by a father who has sons then living not being one for legal necessity, or for payment of an antecedent debt, if made without their consent, may be set aside by one of those sons—partially or wholly according to the province in which the question arises (ss. 259 and 260). If all the sons living at the time of the alienation predecease their father and no other son is born before the death of the last of them so that the father remains the sole coparcener for some time, then the alienation is not liable to be impeached by after-born sons (*o*). If, before the sons alive at the time of the alienation are all dead, another son is born, in the provinces referred to in s. 260, the alienation may be set aside at the instance of the latter also (*p*), unless *before* his birth, the former ratified it (*q*), or their cause of action is lost by

(*m*) *Hanmant* v. *Ramchandra* (1887) 12 Bom. 105.

(*n*) *Bhola Nath* v. *Kartick* (1907) 34 Cal. 372; *Suraj Prasad* v. *Makhar Lal* (1922) 44 All. 382, 385, 66 I.C. 134, ('22) A.A. 51.

(*o*) *Hitendra* v. *Sukhdeo* (1929) 8 Pat. 558, 115 I.C. 886, ('29) A.P. 360; *Mukund Singh* v. *Wajirruddin* (1933) 149 I.C. 506, ('33) A.L. 359; *Visweswara Rao* v. *Surya Rao* (1936) 59 Mad. 667, 163 I.C. 712, ('36) A.M. 440.

(*p*) *Bunwari Lal* v. *Dayasankar* (1909) 13 C.W.N 815, 822; *Tulshiram* v. *Babu* (1911) 33 All 654, 1 I.C. 908; *Bhup Kunwar* v. *Balbir Sahai* (1922) 44 All. 190, 64 I.C. 885, ('22) A.A. 312; *Dwarka Das* v. *Krishan* (1921) 2 Lah. 114, 119-120, 61 I.C. 628, ('21) A.L. 34; *Bhagwat Prasad Bahadur* v. *Devichand Bogra* (1941) 20 Pat. 727, 199 I.C. 408 ('42) A.P. 99.

(*q*) *Chuttan Lal* v. *Kallu* (1911) 33 All. 283, 8 I.C. 719.

S. 270 limitation (*r*). But in the provinces referred to in s. 259, if the cause of action of the coparceners who did not consent to the alienations is barred, the alienation becomes unimpeachable (*s*).

If the coparcener is born before their right is barred, he becomes a coparcener with them in the property, the title to which is not yet lost by the adverse possession of the alienee and all of them can sue to recover their shares or the after-born coparcener alone can sue to recover his share. It is submitted that the principle of the decisions in f.n. (*p*) on p.329 applies to these provinces also ; the only difference being that, in the provinces referred to in s. 260 the whole alienation may be set aside whereas in the provinces in s. 259 the plaintiffs can only recover their share or shares. But an opposite decision has been arrived at in Bombay and Nagpur (*s*). The Bombay decision is based on *Lal Bahadur* v. *Ambika Prasad* (*t*) and the Nagpur decision.

In that case two brothers *A* and *B* effected in 1895 (1) a simple mortgage; (2) a usufructuary mortgage. At that time *A* had two sons *C* aged thirteen and *D* aged three. In 1904 a sale was effected by *A* and *B* (1) to discharge amounts due on certain decrees, (2) to discharge the usufructuary mortgage, (3) to pay off interest on the simple mortgage, and (4) for cash paid to the vendors utilised for certain purposes found to be valid and binding. In 1919 *C*'s sons sued to set aside this sale off 1904. The Judicial Committee found that the sale was made to pay off the mortgage debts and for other purposes binding on the plaintiffs and dismissed the suit. It may here be mentioned that *C* was living in 1919. He never questioned the binding nature of the usufructuary mortgage and any suit by him for that purpose would have been barred by 1907. As to the simple mortgage, whether valid as a mortgage or not it was at least an antecedent debt of *A*. So far the case presents no difficulty.

But there are one or two observations in the judgment which seem to suggest that the plaintiffs, not being born in 1895, could

(*r*) *Raja Ram* v. *Luchman* (1867) 8 W.R. 16, 21 ; *Lachmi Narain* v. *Kishan* (1916) 38 All 126, 33 I.C. 913 ; *Ranodip Singh* v. *Parameshwar Pershad* (1925) 52 I.A. 69, 47 All. 165, 86 I. C. 249, ('25) A.PC. 33.

(*s*) *Kashinath* v. *Baprao* (1940) Nag. 573, 191 I.C. 271, ('40) A.N. 305 ; *Gujrath Oil Mills & Mfg. Co., Ltd.* v. *Patel Shakarabhai* (1943) Bom. 423, 21 I.C. 122, ('43) A.B. 239, 45 Bom. L.R. 507 ; *Bahadur Singh* v *Girdharlal* (1942) Nag. 543, 200 I.C. 166, ('42) A.N. 39.

(*t*) (1925) 52 I. A. 443, 47 All. 795, 91 I C. 471, ('25) A.PC. 264.

never question the mortgages. These observations must be understood with reference to the facts of the case, namely, that the father's right to question the mortgages was barred by 1907 and 1916, there being only one cause of action for all the coparceners. The case cannot be regarded as an authority for the proposition that the after-born coparceners cannot question the mortgages even before the father's right to do so became barred, such conclusion being inconsistent with the decisions in f.n. (*p*) on p. 329 which were not referred to. The learned editor of Mayne's Hindu Law (10th edn.) gave certain reasons in support of the same view (p. 512) and the whole passage was quoted with approval in *Bhagavathi Prasad* v. *Devichand* above cited in f.n. (*p*) on p. 329. It may be incidentally pointed out that there is no conflict between the Patna case just referred to and the decision in *Visweswararao* v. *Surya Rao* (*supra*) f.n. (*o*) on p. 329 as Fazl Ali, J. seems to suppose. In the Madras case there is a gap between the death of the coparcener existing at the time of the alienation and the birth of the plaintiff, during which the father was the sole owner. But there is no such gap in the Patna case. Varma, J. observed "Nandalal died when Amruthlal was 5 or 6 years of age and the interest of Amruthlal in the joint family property which he got when Madhusudan and Nandalal were alive and which passed to him after the death of Madhu Sudan and Nandalal *by survivorship* was not affected by the mortgage." In the Bombay case it is observed "Nor could he continue as heir or legal representative of plaintiff No. 1 since the father defendant No. 2 is alive and the nearer heir." It is submitted that the plaintiffs Nos. 1 and 2 were members of the joint family and there is no question of heirship. Plaintiff No. 2 got the right of Plaintiff No. 1 *by survivorship* as pointed out by Varma, J. in the Patna case. **S. 270**

In the Nagpur case Stone, C. J. referring to *Lal Bahadur* v. *Ambika Prasad* says, "We feel that this case on the point under discussion is not binding on us. Nevertheless it contains an observation (namely, that the alienations are binding on the after-born) to which weight must be attached because it constituted a step necessary to the conclusion namely that these were binding antecedent debts." Here it may be observed that whether the mortgages were valid or not they would be certainly antecedent debts. A little before the passage

S. 270 quoted, Stone, C. J. quotes the case as authority for proposition IV.—"if the cause of action is allowed to become time-barred no son born after the cause of action is time-barred can sue" and not for the proposition that the after-born son cannot sue even before the suit is time-barred. It is therefore submitted that the Bombay and Nagpur decisions are not correctly decided and the decision in the f.n. (*p*) on p. 329 will apply even to the provinces mentioned in s. 259.

The remarks of the Madras High Court in *Raja Vasi Reddi* v. *Lakshmi Narasimham* (*u*) on this point are obiter as the point did not arise in this case.

Illustrations.

(a) *A*, governed by the Mitakshara law, sells certain ancestral property to *B*. *A* has no son either born or begotten at the time of the sale. The sale is made without legal necessity. The sale is *valid*, though made without legal necessity, for the restriction that a coparcener should not sell coparcenary property without legal necessity applies only when there are *other coparceners living at the time*. Therefore if a son *C* is born to *A* two years after the date of the sale, he cannot impeach the sale. Even if there was a son existing at the time of the sale, if the sale had been made with his consent, it would have been valid when made, and therefore not liable to be set aside by *C*.

Note.—The above case assumes that there has been a *complete transfer* of the property to the purchaser. If the transfer is not complete, as where there is a mere *agreement* to sell, and a son is born *before* the sale is completed, the son is entitled to have the sale set aside in its entirety if the parties are governed by the Mitakshara law as applied in Bengal and the United Provinces, and to the extent of the son's interest, if they are governed by that law as applied in Bombay and Madras [see sub-sec. (*1*) above].

(a1) *A* who has a son *B*, sells certain ancestral property to *C* without *B*'s consent and without justifying necessity. *B* then dies. A year after *B*'s death a son *D* is born. *D* cannot impeach the alienation.

(b) *A*, who has a son *B*, sells certain ancestral property to *C*, *without B's consent* and *without justifying necessity*. Two years later, while *B* is living, another son *D* is born to *A*. In provinces referred to in s. 260, the sale not being valid when it was made, *D* also is entitled to have it set aside. But if the sale is ratified by *B before* the birth of *D*, *D* cannot object to the sale, for ratification validates a sale as much as *consent*. But no ratification by *B after D*'s birth would deprive *D* of the right to object to the sale: *Tulshiram* v. *Babu* (1911) 33 All. 654, 10 I.C. 908, see also *Haroddot* v. *Beer Narain* (1869) 11 W.R. 480.

(c) *A*, his son *B*, and *C* alleged to have been adopted by *A*'s paternal uncle as his son, are members of a joint family. During *B*'s *minority*, *A* and *C* divide the family property between them, *A* transferring certain family property to *C*. A son *D* is subsequently born to *A*. *B* and *D* sue *A* and *C* to recover from *C* the property transferred to him by *A* alleging that though *C* was treated by *A* as the adopted son of his uncle, his adoption was invalid, and he was not therefore entitled to any share of the family property. It is clear that if *C*'s adoption was not valid, the transfer to him of a portion of the family property would not be valid, unless it could be supported as a *bona fide* compromise of a disputed claim. Hence in provinces referred to in s. 260 *B* as well as

(*u*) (1940) Mad. 913, ('40) A. M. 691.

S. 270

D are entitled to impeach the alienation : see *Ramkishore* v. *Jainarayan* (1913) 40 Cal. 966, 40 I.A. 213, 20 I.C. 958.

In ills. (b) and (c), in the provinces referred to in s. 259 if *B* files a suit on behalf of the family excepting the alienor, *D* may participate in the benefit of the decree as a member of the joint family.

(*3*) An alienation, valid when it was made, cannot be impeached by a son adopted after the date of alienation (*v*).

(*4*) Where an alienation is made in Allahabad of joint family property by an *individual* coparcener as distinguished from the whole body of coparceners, the question arises as to who is entitled to impeach the alienation [see s. 269]. The following is a statement of the law as settled in that Province :—

(i) The right to impeach an alienation made by an individual coparcener is not confined to the non-alienating coparceners only. It may also be exercised by a subsequent transferee who has acquired by transfer or by limitation the *entire interest* of the whole joint family in the property alienated (*w*).

(ii) The alienor himself cannot impeach his own alienation; nor can a subsequent transferee by private contract of the *interest only of the alienor*. But a purchaser, though it be of the alienor's interest alone, at a sale in execution of a decree against the alienor, is entitled to impeach a previous alienation made by the alienor (*x*).

(iii) The reversionary heir to the estate of a non-alienating coparcener is also entitled to impeach an alienation made by another coparcener (*y*).

(iv) A prior mortgagee of joint family property from a single coparcener is not entitled to impeach a subsequent sale of that property (*z*).

(*v*) *Sudanand* v. *Soorjoomonee* (1869) 11 W.R. 436 ; *Rambhat* v. *Lakshman* (1881) 5 Bom. 630 ; *Brij Raj Saran* v. *Alliance Bank of Simla* (1936) 17 Lah. 686, ('36) A L. 946.

(*w*) *Muhammad* v. *Mithu Lal* (1911) 33 All. 783, 11 I.C. 220 [F.B.]; *Inayat* v. *Hardeo* (1923) 45 All. 692, 74 I.C. 325, ('24) A. A. 29 ; *Madan Lal* v. *Gajendra Lal* (1929) 51 All. 575, 116 I.C. 436, ('29) A.A. 243 ; *Madan Lal* v. *Chiddu* (1931) 53 All. 21, 128 I.C. 829, ('30) A.A. 852 ; *Ram Kishore* v. *Baijnath* (1928) 3 Luck. 598, 113 I.C. 410, ('28) A.O. 287 ; *Kharag Narayan* v. *Janki Rai* (1937) 16 Pat. 230, 169 I.C. 906, ('37) A.P. 516.

(*x*) (1931) 53 All. 21, 128 I C. 829, ('30) A.A. 852, *supra*.

(*y*) *Sarju Prasad* v. *Mangal* (1925) 47 All. 490, 87 I.C. 294, ('25) A.A. 339 ; *Jaipal Singh* v. *Lachman Singh* (1934) 9 Luck. 657, 149 I.C. 543, ('34) A.O. 246.

(*z*) *Durga Prasad* v. *Bhajan* (1920) 42 All. 50, 58 I.C. 481, ('19) A.A. 6.

Ss. 270, 271

Illustrations.

(a) *A*, the manager of a joint family, mortgages joint family property to *B*. *A* then sells the property to *C*. *C* remains in possession of the property adversely to the *whole* family for upwards of 12 years. *C*, having acquired ownership of the whole property by adverse possession, is entitled to challenge the validity of the mortgage to *B* on the ground that it was made without legal necessity (*a*).

(b) The father of a joint family executes a mortgage of joint family property. He then sells the property to meet an antecedent debt. The purchaser, being a transferee of the *entire* interest in the poperty, is entitled to impeach the mortgage on the ground that it was made without legal necessity.

(c) *A*, the manager of a joint Hindu family, executes a mortgage of joint family property. Subsequently all the coparceners join in selling the property to *B*. *B*, being a transferee of the interest of *all* the coparceners, is entitled to impeach the mortgage on the ground that it was made without legal necessity.

(d) *A* and his son *B* are members of a joint Hindu family. *A* executes a mortgage of joint family property to *C*. Thereafter *A* dies. *B* dies next. On *B*'s death his mother succeeds to the property for a widow's estate. *C* sues *B*'s mother on the mortgage and obtains an *ex parte* decree against her. The mother then dies, and on her death *B*'s uncle *D* succeeds to the property as the next reversionary heir of *B*. *D* is entitled to challenge the validity of the mortgage to *C* on the ground that it was made without legal necessity. The decree obtained by *C* against the mother would be binding on *D* unless it was obtained by fraud or collusion (*b*).

(e) *A*, the manager of a joint Hindu family, executes a mortgage of joint family property to *B*. He then sells the property to *C*. *C* sues *B* for redemption. *B* is not entitled to impeach the sale on the ground that it was made without legal necessity (*b*).

According to some Privy Council rulings and a Full Bench ruling of the Allahabad High Court, an alienation made by a *single* coparcener neither for legal necessity nor for the payment of an antecedent debt is *void*. According to later decisions of that Court, such an alienation is *voidable* : see s. 269 (*1*). If it is voidable, it is valid until it is set aside. Most of the cases cited in sub-sec. (*4*) proceeded on the footing that the alienation was *voidable*. This gave rise to the question as to whether the non-alienating coparceners alone were *entitled to avoid* it or others also. The answer is as stated in sub-sec. (*4*). If the alienation is *void*, it confers *no title* on the alienee, and most of the difficulties which arise if the alienation is treated as voidable especially where the alienation and the subsequent transfer are both made by the same coparcener disappear altogether, and the subsequent transferee would be entitled to contend as a matter of course that the alienation is a nullity (*c*).

271. Limitation for setting aside sales.—(*1*) The period of limitation for setting aside an alienation by a father of joint family property is twelve years from the *date when the alienee takes possession of the property* [Limitation Act, 1908, Sch. I, art. 126].

(*2*) The bar of limitation against an elder son who was a major at the date of the alienation by the father does not operate as a bar against a younger son, who was then a minor

(*a*) *Muhammad* v. *Mithu Lal* (1911) 33 All. 783, 11 I.C. 220 [F.B.].

(*b*) *Sarju Prasad* v. *Mangal* (1925) 47 All. 490, 87 I.C. 294, ('25) A.A. 339.

(*c*) See the judgment of Chamier, J., in *Muhammad* v. *Mithu Lal* (1911) 33 All. 783, 790-791, 11 I.C. 220 [F.B.].

and brings a suit to set aside the alienation within three years of his attaining majority (*d*). **Ss. 271, 271A**

Illustration.

A and his sons *B* and *C* are members of a joint Hindu family. In 1906 *A* sells one of the joint family properties to *D*, and delivers possession of the property to him. *B* was a major at the date of the sale. *C* was born in 1900 and he attained majority in 1918. *C* brings a suit against the father and *D* in 1919, that is, within 3 years of his attaining majority, to set aside the sale. If *B* had sued in 1919, his suit would have been barred. The failure of *B* to bring a suit within the period of limitation does not bar *C*'s suit (*e*). [*C*'s suit, it will be noted, is not barred by limitation.]

(*3*) But if an elder son becomes the manager and so capable of giving a discharge the bar against the elder son would bar the younger son also (*f*).

(*4*) The cause of action in a suit to set aside the father's alienation arises when the alienee takes possession of the property. The period of twelve years is therefore to be counted from that date. That is the material date not only as regards the suit of a son in existence at that date, but also the suit of a son not in existence at that date. The extension of three years given by sec. 6 of the Limitation Act cannot be availed of by the sons not in existence at the time of the alienation (*g*).

Illustration.

A and his sons *B* and *C* are members of a joint Hindu family. In 1893 *A* sells one of the joint family properties to *D* and delivers possession of the property to him. In 1900 another son *E* is born to *A*. In 1920 *E* brings a suit against *D* to set side the sale. The suit is barred as it is brought more than 12 years from the date on which *D* took possession. The period of limitation is not to be computed from the date of *E*'s *birth*. If it were to be computed from the date of *E*'s birth, the suit would not be barred, as it was brought within 3 years from his attaining majority (*g*).

271A. Limitation.—A suit by Hindu to set aside an alienation of joint family property made before his birth by his grandfather without any justifying necessity is governed not by art. 126 but by art. 144. But the same principles apply. If the suit is brought more than 12 years after the date of alienation it is barred (*h*).

Note.—It may be noticed that the maintainability of the suit was assumed by the Judges and Advocates.

(*d*) *Jawahir Singh* v. *Udai Prakash* (1926) 53 I.A. 36, 48 All. 152, 93 I.C. 216, ('26) A.PC. 16, approving *Ganga Dayal* v *Mani Ram* (1909) 31 All. 156, 1 I.C. 824, and disapproving *Vignessrara* v. *Bapayya* (1893) 16 Mad. 436, and *Doraisami* v. *Nontisami Salunran* (1915) 38 Mad. 118, 21 I.C. 410, ('15) A.M. 1201.

(*e*) 53 I.A. 36, 48 All. 152, 93 I.C. 216, ('26) A.PC. 16, *supra*.

(*f*) *Karan Singh* v. *Mt. Tetar Kuer* (1937) 16 Pat. 422 (F.B.), 170 I.C. 362, ('37) A.P. 435.

(*g*) *Ranodip Singh* v. *Parmeshwar Pershad* (1925) 52 I.A. 69, 47 All. 165, 86 I.C. 249, ('25) A.PC. 33.

(*h*) *Jivaji Keshav* v. *Venkatesh Krishna* (1940) Bom. 109, 108 I.C. 663, ('40) A.B. 136.

CHAPTER XIII.

COPARCENERS AND COPARCENARY PROPERTY—DAYABHAGA LAW.

Ss. 272, 273

272. Distinguishing features of Dayabhaga joint family.—The conception of a coparcenary and of coparcenary property according to the Dayabhaga law is entirely distinct from that according to the Mitakshara law. The object of this chapter is to state the points of distinction between the Mitakshara law and the Dayabhaga law, such as have been noted in the Dayabhaga and in judicial decisions. As to the points on which the Dayabhaga is silent, the rules of the Mitakshara law are to be applied so far as they are applicable; for, even in Bengal the Mitakshara is accepted as a high authority, yielding to the Dayabhaga only in those points where they differ (*i*).

Besides the Dayabhaga, there are two works which also deal with the respective rights of a father and sons in ancestral property, and which are of authority in Bengal. They are (1) the Dayatattwa and (2) the Dayakrama Sangraha, the former written by Raghunadan who flourished in the 16th century, and the latter by Sree Krishna Tarkalankar who flourished in the 18th century. Both these are treatises on the law of inheritance.

273. Sons do not acquire any right by birth.—According to the Mitakshara law, each son acquires at his birth an equal interest with his father in all ancestral property held by the father, and on the death of the father the son takes the property, not as his heir, but by survivorship (ss. 224, 229).

According to the Dayabhaga law, the sons do not acquire any interest by birth in ancestral property. Their rights arise for the first time on the father's death. On the death of the father they take such of the property as is left by him, whether separate or ancestral, as heirs and not by survivorship (*j*). Since the sons do not take any interest in ancestral property in their father's lifetime, there can be no coparcenary in the strict sense of the word between a father and sons according to the Dayabhaga law, so far as regards ancestral property.

"Sons have not a right of ownership in the wealth of the *living* parents but in the estate of both *when deceased*."—Dayabhaga, chap. i, sec. 30.

The above passage shows that a son has no more vested interest in ancestral property held by his father than he has in property held by his mother. In other words, all heritage, according to the Dayabhaga law, is *obstructed* [s. 219].

(*i*) *Collector of Madura* v. *Moottoo Ramalinga* (1868) 12 M.I.A. 397, 405; *Bhugwandeen* v. *Myna Baee* (1867) 11 M.I.A. 487, 507; *Akshay* v. *Hari Das* (1908) 35 Cal. 721.

(*j*) Dayabhaga, chap. i, secs. 11-31, 38, 44, 50, chap. ii, sec. 8.

Though there cannot be a coparcenary property, so called, between a father and sons according to the Dayabhaga law as regards *ancestral* property, it is suggested by some writers that a father and sons may acquire property jointly, and may thus form themselves into a coparcenary. It is difficult to say how far this view is correct.

274. Absolute power of father to dispose of ancestral property.—Since the sons do not, according to the Dayabhaga law, acquire any interest by birth in ancestral property held by the father, the father can dispose of ancestral property, whether moveable or immoveable, by sale, gift, will or otherwise in the same way as he can dispose of his separate property (*k*).

According to the Mitakshara, the powers of a father to dispose of ancestral property are limited [s. 258].

275. No right of partition or to accounts against father.—Since sons, according to the Dayabhaga law, do not acquire any interest by birth in ancestral property, they cannot demand a partition of such property from the father as they can under the Mitakshara law, nor can they call for an account of the management thereof from the father as they can under the Mitakshara law [s. 239]. The father is the *absolute owner* of the property, and the property being his own, he can manage it in any way he likes (*l*).

The rules as to the management of ancestral property by a manager, given in the last chapter, do not apply at all to a *father* under the Dayabhaga law. The reason is that he is *not a manager* of ancestral property; he is the owner, and sole owner, thereof. Besides, the term "manager" as used in Hindu law refers to the manager of a *coparcenary*, and as stated in s. 273, there can be no coparcenary according to the Dayabhaga law between a father and sons even as regards ancestral property.

276. Conception of ancestral property according to the Dayabhaga law.—As under the Mitakshara law, so under the Dayabhaga law, ancestral property is that which is inherited from a father, paternal grandfather or great-grandfather. Under the Dayabhaga law, however, the male issue of the inheritor do not acquire any interest by birth in such property, as they do under the Mitakshara law [s. 223, sub-sec. (*1*)].

277. Coparceners according to the Dayabhaga law.—According to the Mitakshara law the foundation of a coparcenary is first laid *on the birth of a son*. The son's birth is the starting point of a coparcenary according to that law. Thus

(*k*) *Ramkishore* v. *Bhoobunmoyee* (1859) Beng. S. D. A. 229, 250-251; *Debendra* v. *Brojendra* (1890) 17 Cal. 886. The same rule applies to property the succession to which is governed by the law of primogeniture; *Uddoy* v. *Jadublal* (1880) 5 Cal. 113; *Narain* v. *Lokenath* (1881) 7 Cal. 461.

(*l*) Dayabhaga, chap. I, secs. 11-31, 38-44, 50, chap. II, sec. 8.

S. 277 if a Hindu governed by the Mitakshara law has a son born to him, the father and the son at once become coparceners (*m*).

According to the Dayabhaga law, the foundation of a coparcenary is first laid *on the death of the father*. So long as the father is alive, there is no coparcenary in the strict sense of the word between him and his male issue. It is only on his death leaving two or more male issue that a coparcenary is first formed. His male issue then inherit his property, separate as well as ancestral, as his heirs, but as between themselves they hold it as coparceners, and the property inherited from the deceased is coparcenary property. On the death of any one of the coparceners, his heirs succeed to his share in the coparcenary property [s. 281], and they become members of the coparcenary. Such heirs, in default of male issue, may be his widow or widows, or his daughter or daughters. These two, though females, get into the coparcenary, representing the share of their husband or father as the case may be. A coparcenary under the Dayabhaga law may thus consist of males as well as females. Under the Mitakshara law, no female can be a coparcener with male coparceners [s. 217]. But even under the Dayabhaga law a coparcenary cannot *start* with females. Thus if a person dies leaving two or more widows, or two or more daughters, they cannot constitute a coparcenary.

A, a Hindu, governed by the Dayabhaga law, dies intestate leaving three sons *B*, *C* and *D*. The three brothers will inherit their father's property, and hold it as coparceners. If *B* dies leaving a widow, and *C* dies leaving a daughter, the widow and daughter will become coparceners with *D*.

Similarly, if *A* dies intestate leaving a son, a grandson, whose father is dead, and a great-grandson whose father and grandfather are both dead, they all will inherit the property left by *A* (s. 88), and hold it as coparceners. If *A* leaves a great-great-grandson also, he has no right of inheritance to *A*'s property, and he cannot therefore be a coparcener with the son, grandson, and great-grandson.

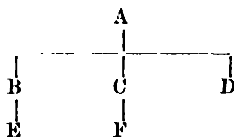
But if *A* dies leaving only one son, the son cannot by himself constitute a coparcenary. *A* must leave him surviving *at least two male issue* for a coparcenary to be formed as between them.

The formation of a coparcenary does not depend upon any act of the parties. It is a creation of the law. It is formed spontaneously on the death of the ancestor. It may be dissolved immediately afterwards by partition, but until then the heirs hold the property as coparceners. The distinction is this: two or more Mahomedans, Parsis or Christians, succeeding to the estate of a deceased person, take it as *co-heirs*, while two or more male issue of a Hindu succeeding to the property of their paternal ancestor take it *as coparceners, subject to all the incidents of coparcenary property*.

(*m*) *Laldas* v. *Motibai* (1908) 10 Bom. L. R. 175.

Ss. 277-279

It will be seen from what has been stated above that a coparcenary under the Dayabhaga law may consist of brothers, or uncles and nephews, or of cousins and the like, but it cannot consist of a father and sons, or of a grandfather and grandsons, or of a great-grandfather and great-grandsons. Thus if *A* dies leaving three sons *B*, *C* and *D* the brothers will be coparceners. If he dies leaving two grandsons, namely, *E* and *F*,



the cousins (*i.e.*, *E* and *F*) will be coparceners. If he dies leaving a son *D* and two grandsons *E* and *F*, the uncle [*D*] with his nephews [*E* and *F*] will be coparceners. If he dies leaving *B*, *C*, *D*, *E* and *F* the coparcenary will consist of *B*, *C* and *D* only. *E* and *F* do not take any share of the inheritance, as their fathers are alive. Moreover they do not take by birth any interest in the property inherited by their respective fathers from *A* [s. 273]. They are not therefore coparceners. But if while the family is still joint, *B* dies leaving *E*, *E* will get into the coparcenary, taking *B*'s share.

278. Coparcenary property.—As under the Mitakshara law, so under the Dayabhaga law, coparcenary property may consist of ancestral property, or of joint acquisitions, or of property thrown into the common stock, and accretions to such property (*n*) [ss. 223, 227, 228].

279. Each coparcener takes a defined share. The essence of a coparcenary under the Mitakshara law is unity of *ownership*. The ownership of the coparcenary property is in the whole body of coparceners. While the family continues joint, no coparcener can say that he is the owner of a definite share, one-third or one-fourth. His interest is a fluctuating interest, capable of being enlarged by deaths, and liable to be diminished by births in the family. It is only on a partition, that he becomes entitled to a defined share. Once the shares of the coparceners are defined, a partition is deemed to have taken place, and the coparcenary is dissolved from that moment.

On the other hand, the essence of a coparcenary under the Dayabhaga law is unity of *possession*. It is not unity of *ownership* at all. The ownership of the coparcenary property is not in the whole body of coparceners. Every coparcener takes a defined share in the property, and he is the owner of that share. That share is defined immediately the inheritance falls in. It does not fluctuate with births and deaths in the family. Even before partition any coparcener can say that

(*n*) *Sreemutty Soorjeemooney Dossee* v. *Denobundoo* (1856) 6 M. I. A. 526, 539.

Ss. 279-281 he is entitled to a particular share, one-third or one-forth. Thus, if *A* dies leaving three sons, *B*, *C* and *D*, each son will take one-third, and each one will be the owner of his one-third share. The sons are coparceners in this sense that their *possession* of the property inherited from *A* is *joint*. It is the unity of *possession* that makes them coparceners. So long as there is unity of possession, no coparcener can say that a *particular* third of the property belongs to him; that he can say only after a partition. Partition then, according to the Dayabhaga law, consists in splitting up *joint possession* and *assigning specific portions* of the property to the several coparceners. According to the Mitakshara law, it consists in splitting up *joint ownership* and in defining the *share* of each coparcener.

No doubt, a coparcenary under the Mitakshara law also is characterized by unity of possession, but that is only an appendage to the unity of ownership. Such being the case it is not necessary to constitute a partition under that law that the unity of possession should also be destroyed and specific portions of the property assigned to the coparceners. It is quite enough if the unity of ownership is destroyed, and the share of each coparcener defined, so that any one coparcener can say that he is the owner of a definite share, one-third or one-fourth. Nothing further need be done. The members may continue *joint in possession*, but the coparcenary is dissolved. Thenceforward the share of each member will on his death pass to his heirs. The members having separated the principle of survivorship ceases to apply [ss. 322, 325].

280. Rights of purchaser of coparcener's interest in execution.—Since a coparcener under the Dayabhaga law takes a defined share in the property, a purchaser at a Court-sale of his share is entitled to be put into physical possession of that share (*o*). As to Mitakshara law, see sec. 289.

281. No right of survivorship.—As every coparcener under the Dayabhaga law takes a *defined* share of the coparcenary property, his share will on his death pass to his heirs in the order mentioned in section 88, and not to his coparceners by survivorship.

(*o*) *Koonwur Bijoy* v. *Shama Soonduree* (1865) 2 W. R. (Mis.) 30; *Eshan Chunder* v. *Nund Coomar* (1867) 8 W. R. 239.

Under the Mitakshara law, no coparcener takes a defined share in the coparcenary property, and his interest on his death passes to the surviving coparceners and not to his heirs (s. 229).

282. Absolute power of coparcener to dispose of his share.—Since every coparcener under the Dayabhaga law takes a defined share of the coparcenary property, it follows that a coparcener governed by that law can alienate his share by sale or mortgage, or dispose of it by gift or will, in the same manner as he can dispose of his separate property (*p*). On his death intestate, his share will go to his heirs in the order prescribed in section 88. See sec. 281.

No coparcener can, according to the Mitakshara law, dispose of his interest in the coparcenary property either by gift or by will, nor can he alienate it by sale or mortgage except in the Bombay and Madras Presidencies [ss. 259-260].

It has been held that where the share of a coparcener governed by the Dayabhaga law is sold in execution of a decree passed against him, the purchaser is entitled to be put into joint possession with the other coparceners (*q*). Similarly, it has been held that a coparcener may lease out his own share, and put his lessee in possession (*r*).

283. Manager and his power.—It would seem that the powers of a manager under the Dayabhaga law are the same as those of a manager under the Mitakshara law (*s*). He can contract a debt for a joint family purpose, and a decree passed against him for such a debt as manager will bind the other members, though they are not parties to the suit (*t*) [s. 253]. He can also mortgage the family property for the purposes of the family business (*u*) [s. 242]. In a suit on a mortgage by two managing members of the family for a debt due by the family, the other members will not be liable until the remedy on the mortgage is exhausted. After the mortgaged properties are brought to sale, the other members may be liable (*v*).

284. Enjoyment of coparcenary property.—Since every coparcener under the Dayabhaga law takes a defined share of the coparcenary property, he is entitled to make any use

(*p*) *Kounla* v. *Ram Huree* (1827) 4 Beng. Sel. R. 196 (new ed. 247); *Anunchand* v. *Kishen* (1805) 1 Beng. Sel. R. 115 (new ed. 153).

(*q*) *Rajanikanth* v. *Ram Nath* (1884) 10 Cal. 244.

(*r*) *Ram Debul* v. *Mitterjeet* (1872) 17 W. R. 420; *Macdonald* v. *Lalla Shib* (1873) 21 W. R. 17.

(*s*) But see *Balakrishna* v. *Muthusami* (1909) 32 Mad. 271, 274, 3 I. C. 878.

(*t*) *Dwarka Nath* v. *Bungshi* (1905) 9 C. W. N. 879.

(*u*) *Bemola* v. *Mohun* (1880) 5 Cal. 792.

(*v*) *Sukhadakanta Bhattacharjya* v. *Jojineekanta Bhattacharjya* (1933) 60 Cal. 1197, 149 I. C. 878, ('34) A.C. 73.

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he likes of the portion of the coparcenary property in his occupation (w). He may even lease out his share, and put his lessee in possession (x). But he must not do any act which is injurious to the coparcenary property (y), or which amounts to an infringement of the right of the other coparceners. Thus, he cannot enter into possession of a specific portion of joint agricultural land without the consent of the other coparceners, and claim to cultivate it for his own benefit (z). But if he is in occupation of a specific portion of such land by consent he may cultivate it in a proper course of cultivation, and appropriate the income for his sole use (a).

285. Coparcener's right of partition.—As under the Mitakshara law, so under the Dayabhaga law, every adult coparcener has a right to call for a partition of the coparcenary property (b).

286. Presumptions as to coparcenary property.—The presumptions with regard to joint family and joint family property which apply to cases under the Mitakshara law would seem to apply also to cases under the Dayabhaga law [s. 233]. But there is no presumption under the Dayabhaga law that property purchased by a son in his name in the father's lifetime and of which the son has been in possession since the purchase is joint family property. The burden of proof in such a case lies on those who deny the ownership of the son (c). Where the property purchased by one of the sons is a house, even though the father and the sons are living in it, the onus of proving that it was thrown into the common stock, or that they also contributed to the acquisition, is on the other sons (d).

In the case cited above, it transpired after the death of the father that certain property stood in the name of one of the sons, who was in possession of it. The other sons sued for a partition of the property, alleging that though the property stood in the name of their brother, it really belonged to the father. The lower Court held that the property must be presumed to be joint family property, and that the burden lay on the son in whose name it stood to prove that it was his self-acquired property. The High Court reversed the judgment, and held that the burden of proof lay on the other sons to prove that it belonged to the father. It is clear that there being no joint family during the father's lifetime, the property cannot in any sense be called joint family property. It is only after the father's death that a joint family is formed and it is then that the presumptions as to joint family property set forth in sec. 233 above arise.

(w) *Eshan Chunder* v. *Nund Coomar* (1867) 8 W. R. 239.
(x) *Ram Debul* v. *Mitterjeet* (1872) 17 W. R. 420.
(y) *Gopee Kishen* v. *Hem Chunder* (1870) 13 W. R. 322 [pulling down a common verandah].
(z) *Stalkartt* v. *Gopal* (1873) 20 W. R. 168.
(a) *Robert Watson & Co.* v. *Ramchand* (1891) 18 Cal. 10, 21, 17 I.A. 110, 120.
(b) *Sreemutty Soorjeemoney Dossee* v. *Denobundoo* (1856) 6 M.I.A. 526, 539.
(c) *Sarada* v. *Mahananda* (1904) 31 Cal. 448.
(d) *Hemchandra Ganguli* v. *Matilal Ganguli* (1933) 60 Cal. 1258, 149 I.C. 177, ('34) A.C. 68.

CHAPTER XIV.

DEBTS—MITAKSHARA LAW

287. Contents of the Chapter.—The present Chapter deals with "Debts". The subject may be considered under the following heads :— S. 287

I. Liability of *separate* property for debts [s. 288].

II. Liability of the *undivided interest* of a coparcener for his debts [s. 289].

III. Liability of *joint family property* for father's personal debts—

(*i*) where the property is sold in execution of a decree obtained against the father alone [s. 294].

(*ii*) where the property is alienated by the father for the payment of an antecedent debt [sec. 295].

Of debts in general.—A debt may be contracted by a Hindu male *for his own private purposes*, or it may be contracted by him for the *purposes of the joint family.* Debts contracted for joint family purposes have been dealt with in secs. 234, 240-244. This and the next Chapter are confined to debts contracted by a Hindu for his own personal benefit. The present Chapter deals with the Mitakshara law of debts; the next Chapter with the Dayabhaga law of debts.

A Hindu may possess separate property. He may also be entitled to an undivided interest in coparcenary property. The separate property of a Hindu, whether he is joint or separate, is liable for the payment of his debts both in his lifetime and after his death. His undivided coparcenary interest is not liable *after* his death *unless it was attached or sold in his lifetime.* To this, however, there is an exception where a father or paternal grandfather or paternal great-grandfather dies leaving private debts. In such a case, if the debts are not of an immoral character, the entire joint family property including his sons' undivided interest therein is liable for the payment of his debts even after his death, though such interest may not have been attached in his lifetime. The reason is that a Hindu male is under a *pious obligation* to pay the private debts of his father, grandfather and great-grandfather, provided the debts are not of an immoral character. This is a special liability attaching to sons, grandsons, and great-grandsons according to the Hindu law, and it gave rise to several vexed questions which have now been settled by recent decisions of the highest tribunal. This liability, however, is *not a personal liability,* that is to say, their *separate* property is not liable to pay the personal debts of the ancestor, Their liability is confined to their *undivided interest in the joint family property.*

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When we speak of the liability of an heir, we are concerned with the *separate* property left by the deceased: and when we speak of the liability of a surviving coparcener, we are concerned with the coparcenary property in which the deceased coparcener had an interest in his lifetime. We shall deal, first, with the liability of the *heir* of a deceased Hindu to pay his debts out of the *separate* property of the deceased [sec. 288]. Next, we shall consider whether the *surviving coparcener* is liable to pay the debts of a deceased coparcener out of the *coparcenary* property, and if so, in what cases [secs. 294-295]. We shall see that so far as the liability of an heir is concerned, it does not make any difference whether the heir is a son, grandson, or any other relation. The question of relationship to the deceased becomes important when coparcenary property is sought to be made liable for the debts of a deceased coparcener.

I.—*Liability of separate property for debts.*

288. Liability of "heirs" for debts.—As regards the liability of an *heir* of a deceased Hindu to pay the debts of the deceased, it is settled law that he is liable only to the extent of the assets inherited by him from the deceased. The heir is *not personally* liable to pay the debts of the deceased, *not even if he be a son or grandson* (e).

This section deals with the liability of an *heir* for debts. As regards debts, the *pure Hindu law* drew a distinction between the liability of a son and grandson on the one hand and the liability of other heirs on the other. According to that law—

(1) an heir *other than a son or grandson* was liable to pay the debts of the deceased to the extent of the assets or property inherited by him from the deceased; but

(2) an heir, being a *son or grandson*, was liable to pay the debts of his deceased father or grandfather, even if no assets had been inherited by him; in other words, if the father or grandfather died without leaving any property or left property not sufficient to pay the debts in full, the son and grandson were liable to pay the debts of the deceased *out of their own property*, provided the debts were not of an immoral or illegal character [sec. 298]. This rule, however, was not considered to be equitable, and it was not followed in any part of British India except in the Bombay Presidency. In that Presidency also the law was altered by legislation in 1866 so as to limit the liability of the son and grandson to assets inherited by them from the deceased ancestor (*f*) [see the Bombay Hindu Heirs' Relief Act, 1866]. The result is that the liability of sons and grandsons *as heirs* is now no more than the liability of any other heir.

A simple contract debt is not a charge upon the property of the deceased. A Hindu heir, therefore, may alienate the property inherited by him from the deceased even before payment of debts due by the deceased. But in that case the heir is personally liable to the creditor of the deceased (*g*).

(e) *Keval* v. *Ganpati* (1884) 8 Bom. 220; *Girdharlal* v. *Bai Shiv* (1884) 8 Bom. 309; *Udaram* v. *Ranu* (1875) 11 Bom. H. C. 76; *Sakaram* v. *Govind* (1873) 10 Bom. H. C. 361; *Lallu* v. *Tribhuwan* (1889) 13 Bom. 653.

(*f*) *Anant* v. *Tukaram* (1929) 53 Bom. 463, 119 I.C. 179, ('29) A.B. 233.

(*g*) *Unnopoorna* v. *Ganga* (1865) 2 W.R. 296; *Jamiyatram* v. *Parbkudas* (1872) 9 Bom. H.C. 116.

No distinction is made in this section between debts properly incurred by the deceased and debts incurred for an unlawful or immoral purpose because the debts are to be paid not out of the joint family property, but out of the separate property of the deceased.

A Hindu father passes a promissory note to his creditor in respect of a debt barred by limitation. Afterwards he dies leaving a son. He also leaves *separate* property. The son is bound to pay the creditor out of the separate estate of the deceased. He is not entitled to object on the ground that the note was in respect of a time-barred debt (*h*). See the Indian Contract Act, 1872, sec. 25 (3).

It will be seen from what has been stated above, that so far as the liability of an *heir* is concerned, there is no distinction now between the Hindu law and other systems of law in British India. We next proceed to consider how far the undivided interest of a member of a joint Hindu family in the joint family property is liable for the payment of his debts.

II.—Undivided coparcener's interest when liable for his debt.

289. Undivided coparcenary interest, when liable for coparcener's debt.—According to the Mitakshara law as applied in all the provinces, the undivided interest of a coparcener may be attached in his lifetime in execution of a decree against him for his personal debt (*i*). If it is *attached in his lifetime*, it may be sold after his death whether the order for sale was made in his lifetime (*j*), or after his death (*k*). But it *cannot be attached after his death* (except where the coparcener is the father), for it then ceases to be his interest and passes to the other coparceners *by survivorship* (*l*). It is only an attachment effected during the lifetime of the debtor that will prevent the accrual of his interest to his coparceners by survivorship.

If the deceased coparcener does not leave *separate* property, a creditor who has not attached the undivided interest of the deceased in his lifetime is absolutely without a remedy.

An attachment *before judgment* of the undivided interest of a coparcener not followed by a decree in his lifetime does not defeat the right of survivorship of the other coparceners (*m*). It is not settled whether attachment before judgment operates to defeat the right of survivorship in cases where such attach-

(*h*) *Narayanasami* v. *Samudas* (1883) 6 Mad. 293; *Ram Kishan* v. *Chhedi* (1922) 44 All. 628, 68 I.C. 235, ('22) A.A. 402.

(*i*) *Deen Dyal* v. *Jugdeep* (1877) 3 Cal. 198, 4 I.A. 247; *Udaram* v. *Ranu* (1875) 11 Bom H. C. 76.

(*j*) *Suraj Bunsi Koer* v. *Sheo Proshad* (1879) 5 Cal. 148, 174, 6 I.A. 88, 109. See *Sheikh Karoo* v. *Rameshwar Rao* (1921) 6 Pat. L. J. 451, 458, 62 I.C. 905, ('23) A.P. 143 [mortgage decree].

(*k*) *Bithal Das* v. *Nand Kishore* (1901) 23 All. 106; *Faqirchand* v. *Sant Lal* (1926) 48 All. 4, 89 I. C. 291, ('26) A. A. 157. See *Madho Pershad* v. *Mehrban Singh* (1890) 17 I.A. 194, 197, 18 Cal. 157, 161; *Sheo Mahup Bikram Singh* v. *Mahant Thakur Das* (1940) 15 Luck. 503, 187 I.C. 90 ('40) A.O. 200.

(*l*) See *Suraj Bunsi Koer* v. *Sheo Proshad* (1879) 5 Cal. 148, 6 I.A. 88; (1890), 17 I. A. 194, 197, 18 Cal 157,161, *supra*.

(*m*) *Ramanayya* v. *Angappayya* 17 Mad. 144; *Kalianna Goundan* v. *Masayappa Gounden* (1913) Mad. 397, 207 I.C. 579 ('43) A.M. 149.

S. 289 ment is followed by a decree in the lifetime of the defendant. The High Courts of Bombay (*n*) and Patna (*o*) have held that it does not. The High Court of Madras (*p*) has held that it does. The ground of the Madras decision is that where a decree follows on an attachment before judgment, no reattachment is necessary; therefore, the mere passing of the decree renders the attachment before judgment as effective as an attachment after decree. See the Code of Civil Procedure 1908, O. 38, r. 11.

Illustrations.

(a) *A* and his nephew *B* are members of a joint Hindu family. *A* is indebted to *C* in the sum of Rs. 3,000. *C* may obtain a decree against *A*, and may enforce it in *A*'s lifetime by attachment and sale of *A*'s undivided interest in the joint property. But if *A*'s interest in the joint property is not attached in *A*'s lifetime, it cannot be attached *after his death.*

(b) *A* and his brother *B* are members of a coparcenary. *A* is indebted to *C* in the sum of Rs. 3,000. *C* obtains a decree against *A* in *A*'s lifetime. Before any step is taken in execution of the decree, *A* dies leaving a widow and his brother *B*. He also leaves separate property worth Rs. 2,000. Here *A*'s separate property will pass to his widow as his heir, and *C* may enforce the decree by attachment and sale of that property. But he cannot attach *A*'s undivided interest in the coparcenary property for the balance of his debt, for that interest has passed to *B* by survivorship.

If, in the case put above, no suit was instituted by *C* against *A* in *A*'s lifetime, *C* could *institute* a suit against *A*'s widow after *A*'s death as his heir and legal representative, and obtain a decree against her, and enforce it by attachment and sale of *A*'s *separate* property inherited by her. But he cannot bring a suit against *B* to recover his debt out of the *coparcenary* property. Similarly, if *A* dies after suit, but before decree, *C* may *continue* the suit against *A*'s widow as his heir, and obtain a decree against her, and enforce it by attachment and sale of *A*'s *separate* property. But he cannot proceed against *A*'s undivided interest in the joint property. That interest will pass to *B* who will take it by survivorship free from the burden of the debt.

(c) *A* and his brother *B* are members of a joint family. *A* is indebted to *C* in the sum of Rs. 3,000. *C* obtains a decree against *A*, and in execution of the decree gets *A*'s interest in the joint property attached. *A* then dies leaving *B*. The interest of *A* in the joint property, having been attached in *A*'s lifetime, may be sold in execution *after A's death.* The point to be noted is that if the share of a coparcener is *attached in his lifetime*, it may be *sold in execution after his death.* The *sale* may take place after the death of the debtor, but the *attachment* must take place in the lifetime of the debtor.

(d) A coparcenary consists of a father and son. The *son* dies indebted to *C* in the sum of Rs. 5,000. The son does not leave any separate property. *C* cannot proceed against the son's undivided interest in the coparcenary property. It would been have different if *C* had obtained a decree against the son, and attached his interest in the coparcenary property in his lifetime: *Udaram* v. *Ranu* (1875) 11 Bom. H.C. 76 [A *father* is under no religious obligation to pay the debts of his son].

(*n*) *Subrao* v. *Mahadevi* (1914) 38 Bom. 105, 27 I.C. 330, ('14) A.B. 256. See also *Laxman* v. *Vinayak* (1916) 40 Bom. 329, 33 I.C. 956, ('16) A.B. 262.

(*o*) *Sunder Lal* v. *Raghunandan* (1924) 3 Pat. 250, 83 I.C. 413, ('24) A.P. 465.

(*p*) *Sankaralinga* v. *Official Receiver* (1925) 49 Mad. L.J. 616, 92 I.C. 504, ('26) A.M. 72.

It will be seen from what has been stated above, that a person lending money to a Hindu who has *no separate property* of his own, has no chance of recovering back his money, unless he obtains a mortgage or a charge on the undivided interest of the debtor in the joint family property [ss. 268, 269], or, where he has not obtained such a mortgage or charge, he obtains a decree against the debtor and attaches his undivided interest in the joint family property *in the lifetime of the debtor*. It is, however, different where the debtor is a father, grandfather or great-grandfather : see ss. 290-294.

As a general rule, the execution of a decree consists of two steps, namely, attachment and sale. Where a creditor obtains a decree against a coparcener, the first step in execution, if he wants to proceed against the undivided interest of his debtor in the joint property, is to apply for attachment of the right, title and interest of the debtor in the joint property. After the right, title and interest is attached, the next step is the sale of such right, title and interest. After the property is sold, the purchaser is entitled to call upon the other coparceners to come to a partition with him, and if they refuse, to bring a suit against them for partition of the coparcenary property [s. 261].

III.—Liability of joint family property for father's debts.

290. Pious obligation of son, grandson and great-grandson to pay ancestor's debts.—(*1*) Where the sons (which expression throughout includes son's sons and son's son's sons) are joint with their father, and debts have been contracted by the father in his capacity of manager and head of the family *for family purposes* [s. 240], the sons *as members of the joint family* are bound to pay the debts to the extent of their interest in the coparcenary property [ss. 240-242].

Where the sons are joint with their father, and debts have been contracted by the father *for his own personal benefit*, the sons are liable to pay the debts *provided* they were not incurred for an illegal or immoral purpose [s. 298]. The liability to pay the debts contracted by the father, though for his own benefit, arises from an *obligation of religion and piety* which is placed upon the sons under the Mitakshara law to discharge the father's debts, where the debts are not tainted with immorality (*q*). The liability exists irrespective of the fact whether the joint family includes persons other than the father and son (*r*).

(*q*) *Hunoomun Persaud* v. *Musammat Babooee* (1856) 6. M. I. A. 393, 421; *Girdharee Lall* v. *Kantoo Lal* (1874) 1 I. A. 321, 14 Beng. L. R. 187; *Suraj Bunsi Koer* v. *Sheo Proshad* (1878) 5 Cal. 148, 6 I.A. 88; *Muttayan* v. *Zamindar of Sivagri* (1883) 6 Mad. 1, 9 I. A. 128; *Maruthappan* v. *Niraikulathan* (1937) Mad. 943, 169 I. C. 292, ('37) A. M. 434; *Chockalingam* v *Muthukaruppan* (1938) Mad. 1019, ('38) A. M. 849.

(*r*) *Lalta Prasad* v. *Gajadhar Shukul* (1933) 55 All. 283, 190 I.C. 181, ('33) A.A. 235; *Virayya* v. *Parthasarathi Appa Rao* (1934) 57 Mad. 190, 149 I.C. 188, ('33) A.M. 690; *Chhotey Lal* v. *Ganpat Rai* (1935) 57 All. 590, 150 I.C. 411, ('34) A.A. 590 (F.B.); overruling *Official Liquidator, U.P. Oil Mills Co., Ltd.* v. *Jamna Prasad* (1933) 55 All. 417, 143 I.C. 762, ('33) A.A. 334. This applies to Mithila also where the law is the same as the law of the Mitakshara except in a few matters; *Sourendra Mohan* v. *Hari Prasad* (1926) 5 Pat. 135, 155, 91 I.C. 1033, ('25) A.PC. 280.

S. 290 (2) *Liability not personal.*—The liability of the son, grandson and great-grandson to pay the debts of their ancestor is not a personal one, that is to say, the father's creditor is not entitled to proceed against their person or their separate property. It is limited to their interest in the joint family property (*s*), unless he accepts personal liability in the course of judicial proceedings such as Insolvency Proceedings (*t*).

Brihaspati's text.—"He who having received a sum lent or the like does not repay it to the owner will be born hereafter in his creditor's house, a slave, a servant, a woman, or a quadruped". [Colebrooke, Vol. I, p. 334]. The liability to pay the father's debts arises from the religious obligation to rescue him from the penalties arising from the non-payment of his debts.

Illustration.

A coparcenary consists of a father and son. The father borrows Rs. 5,000 from *C* for an *immoral* purpose. *C* may obtain a decree against the father and enforce it by attachment and sale of his interest in the joint family property *in the father's lifetime.* But if the father's interest is not attached in his lifetime, it cannot be attached after his death, and it will then pass to the son by survivorship. See s. 289 and s. 294 (*6*).

(3) *Duration of liability.*—The pious obligation of the sons to pay the father's debts lasts only so long as the liability of the father subsists. If the debts are saved from limitation by the father's acknowledgment, the son is bound to pay (*u*) even though the acknowledgment by the father is after a partition between the father and the son (*v*). The sons' liability is neither joint nor joint and several as those terms are ordinarily understood in English law (*w*).

Thus if the father is adjudicated an insolvent for debts contracted by him, and he afterwards obtains his discharge, the effect of the discharge is to release the father from those debts. No suit can therefore be maintained against the father for those debts, and since no suit can be maintained against the father, none can be maintained against the sons in respect of those debts (*x*).

(4) *Liability exists even in father's lifetime.*—The liability of the sons to pay the father's debts exists whether the father be alive or dead (*y*). This liability exists even where by

(*s*) *Peda Venkanna* v. *Sreenivasa* (1918) 41 Mad. 136, 142, 43 I.C. 225, ('19) A.M. 1175; *Sukhdeo* v. *Madhusudan* (1931) 10 Pat. 305, 132 I.C. 871, ('31) A.P. 177; *Bissessor Ram* v. *Ramakant Dubey* (1934) 13 Pat. 7, 151 I.C. 379, ('34) A.P. 187; *Devi Das* v. *Jada Ram* (1934) 15 Lah. 50, 147 I.C. 225, ('33) A.L. 857.

(*t*) *Coimbatore Venkataraman Vilas Co., Ltd.* v. *Official Receiver, Coimbatore* (1940) Mad. 191, 186 I.C. 125, ('40) A.M. 30.

(*u*) *Lalta Prasad* v. *Gajadhar Shukul* (1933) 55 All. 283, 149 I.C. 181, ('33) A.A. 235.

(*v*) *Muniswami* v. *Kutti* (1933) 56 Mad. 833, 145 I.C. 404, ('33) A.M. 708; *Thadi Murali Mohan Reddi* v. *Medapati Gangaraju* (1942) Mad. 95, 197 I.C. 199 ('41) A.M. 772 (F.B.).

(*w*) *Narayanan* v. *Veerappa* (1917) 40 Mad. 581, 35 I. C. 918, ('17) A.M. 989.

(*x*) (1917) 40 Mad. 581, 35 I.C. 918, ('17) A.M. 989, *supra*.

(*y*) *Brij Narain Rai* v. *Mangla Prasad* (1924) 51 I.A. 129, 46 All. 95, 77 I.C. 689, ('24) A.PC. 50; *Abdul Karim* v. *Ram Kishore* (1925) 47 All. 421, 86 I.C. 837, ('25) A.A. 327; *Badri Prasad* v. *Madan Lal* (1893) 15 All. 75, 79 [F.B.]; *Govind* v. *Sakharam* (1904) 28 Bom. 383, 389; *Ramasami* v. *Ulaganatha* (1899) 22 Mad. 49, 63; *Debendra* v. *Fyzabad Bank* (1924) 3 Pat. 63, 75 I.C. 53, ('24) A.P. 94.

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a custom in the Punjab, the son cannot enforce partition during the father's lifetime (*z*).

There arose recently a conflict of opinion whether there was any pious obligation on the part of the sons to pay the father's debts in the lifetime of the father, or whether the obligation arose for the first time after the father's death. The conflict arose out of some observations of the Judicial Committee in *Sahu Ram's* case (*a*). Following those observations, the Allahabad High Court held that the obligation did not arise until after the father's death (*b*). On the other hand, the Madras (*c*) and Bombay (*d*) High Courts held that the liability arose even in the father's lifetime, and that the observations in *Sahu Ram's* case were mere *obiter dicta* and they did not affect the law as laid down by the Judicial Committee itself in a long line of decisions. In a later case, that of *Brij Narain Rai* v. *Mangla Prasad* (*e*), their Lordships of the Privy Council held that the observations in *Sahu Ram's* case referred to above were not necessary for the decision of the case, and that the sons were liable for the father's debts whether the father was alive or dead when the liability attached.

It may here be observed that under the old Hindu law the liability of the son to pay the father's debt did not arise until after the father's death. Under Hindu law as interpreted by the British Courts the liability exists even in the lifetime of the father. To this extent the British Courts have extended the liability of the son. In another respect, however, that liability has been curtailed, for while under the old Hindu law, the liability extended to the personal property of the son, it is now limited to his interest in the joint family property.

(5) *Debt contracted by father after partition.*—The son is not liable for a debt contracted by the father after partition.

(6) *Liability of son after partition for debt contracted by father before partition.*—It is now held by all the courts in India that the son is liable after partition for a debt contracted by the father before partition (*f*). But if the suit is filed after partition against the father only the decree cannot be executed against the son (*g*).

(*z*) *Nihal Chand Gopal Das* v. *Mohan Lal* (1932) 13 Lah. 455, 135 I.C. 197, ('32) A.L. 211.

(*a*) (1917) 44 I.A. 126, 39 All. 439, 443, 444, 39 I. C. 280, ('17) A. PC. 61.

(*b*) *Kishen Singh* v. *Chhajju Singh* (1923) 45 All. 90, 79 I. C. 238, ('23) A.A. 206.

(*c*) *Peda Venkanna* v. *Sreenivasa* (1918) 41 Mad. 136, 141, 148, 43 I.C. 225, ('19) A.M. 1175 [personal decree]; *Armugham* v. *Muthu* (1919) 42 Mad. 711, 52 I. C. 525, ('19) A. M. 75 [F.B.] [mortgage for antecedent debt]; *Kandasmi* v. *Kuppu* (1920) 43 Mad. 421, 55 I.C. 320, ('20) A.M. 479 [mortgage not for antecedent debt]; *Sama Rao* v. *Vannajee* (1923) 46 Mad. 64, 71 I. C. 153, ('23) A.M. 36 [mortgage not duly attested and therefore a nullity].

(*d*) *Hanmant* v. *Ganesh* (1919) 43 Bom. 612, 627-630, 51 I.C. 612, ('18) A.B. 13.

(*e*) (1924) 51 I.A. 129, 46 All. 95, 77 I.C. 689, ('24) A.PC. 50.

(*f*) (Calcutta) *Kulada Prasad* v. *Haripada* (1913) 40 Cal. 407, 17 I. C. 257 [a case of partition constituted by conversion of son]. (Madras) *Ramchandra* v. *Kondayya* (1901) 24 Mad. 555; *Jagannatha Row* v. *Viswesan* (1924) 47 Mad. 621, 80 I. C. 228, ('24) A.M. 682; *Subramania* v. *Sabapathy* (1928) 51 Mad. 361, 110 I.C. 141, ('28) A. M. 657 [F. B.] (Bombay) *Annabhat* v. *Shirappa* (1928) 52 Bom. 376, 110 I. C. 269, ('28) A. B. 232. (Allahabad) *Bankey Lal* v. *Durga Prasad* (1931) 53 All. 868 [F.B.], 135 I.C. 139, ('31) A. A. 512 (settling the conflict between the earlier decisions). (Patna) *Atul Krishna Roy* v. *Lala Nandanji* (1935) 14 Pat. 732 [F.B.], 157 I.C. 53, ('35) A. P. 275 (overruling an earlier decision). (Lahore) *Jawahir Singh* v. *Parduman Singh* (1933) 14 Lah. 399, 141 I.C. 424, ('33) A.L. 116. (Nagpur) *Firm Govindram Dwarkadas* v. *Nathulal* (1938) Nag. 10, 170 I.C. 724, ('37) A.N. 45. (Oudh) *Jageshwar* v. *Manni Ram* (1927) 2 Luck. 561, 101 I.C. 907, ('27) A. O. 180.

(*g*) *Firm Govindram Dwarkadas* v. *Nathulal* (1938) Nag. 10, 170 I.C. 724, ('37) A.N. 45; *Atul Krishna Roy* v. *Lala Nandanji* (1935) 14 Pat. 732 [F.B.], 157 I.C. 53, ('35) A.P. 275 (suit for money filed in Jan. 1931. Partition decreed in Mar. 1931 dates back to Nov. 1930 when the suit was filed); *Kuppan Chettiar* v. *Masagoundan* (1937) Mad. 1004, 169 I.C. 400 ('37) A.M. 424; *Krishnaswami* v. *Ramaswami* (1899) 22 Mad. 519.

Ss. 290A-292

290A. Grandfather's share—Where a decree has been obtained against a Hindu who was a member of a joint family consisting of himself his father and his son and the judgment debtor and his father died soon after, it was held that the liability of the son to pay the father's decree-debt covers even the share of the judgment debtor's father (*h*).

291. Extent of liability of grandson and great-grandson.—The son is bound to pay the father's debt with interest. So also is the grandson (*i*). It was at one time supposed that the pious obligation to pay ancestral debts did not extend beyond the grandson. But it has now been held by the highest tribunal that the great-grandson is bound to pay the great-grandfather's debts, and that his liability is co-extensive with that of the son and grandson (*j*).

Brihaspati says : "The sons must pay the debts of their father, when proved, as if they were their own, that is with interest ; the son's son must pay the debt of his grandfather but without interest ; and the son's son's son shall not be compelled to discharge it unless he has assets" : [Colebroke, Vol. I, p. 265]. The distinction which has been made by the Hindu lawyers has not been recognised by the British Courts.

In *Chet Ram* v. *Ram Singh* (*k*), the Judicial Committee observed, upholding the view expressed by the High Court of Allahabad (*l*), that there was no pious obligation on the grandson to pay the debts of his grandfather while his own father was living. But this view must now be taken to have been superseded by the decision of the same tribunal in *Masit Ullah* v. *Damodar Prasad* (*m*). In that case the joint family consisted of *A* and his son *B*. *A* sold an item of the joint family property to discharge a debt that was contracted by his grandfather. It was held that *B*'s interest in the property was bound by the sale, as the sale was made to liquidate his (*B*'s) great-grandfather's debt which *B* was under a pious obligation to pay.

It will be seen from ss. 289-291 that no coparcener *except a son, grandson or great-grandson* is liable for the private debts of any other coparcener. Thus a nephew is not liable for the debts of his uncle ; therefore, if an uncle and nephew are members of a joint family, the nephew's interest in the joint property cannot be attached and sold in execution of a decree against the uncle (*n*).

292. Creditor's suits.—(*1*) *Suit against father.*—In a case where the son is under a pious obligation to pay the father's debt, the creditor may sue *the father alone* and obtain a decree against him, and he may execute the decree by

(*h*) *Shrawan* v. *Jangalya* (1945) Nag. 410.

(*i*) *Lachman Das* v. *Khunnu Lal* (1897) 19 All. 26 [F.B.]. *Ladu* v. *Gobardhan Das* (1925) 4 Pat. 478, 481-482, 86 I. C. 721, ('25) A. P. 470.

(*j*) *Masit Ullah* v. *Damodar Prasad* (1926) 53 I.A. 204, 48 All. 518, 98 I. C. 1031, ('26) A.PC. 105, *Sheo Ram* v. *Durya* (1928) 3 Luck. 700, 112 I. C. 288, ('28) A. O. 378 [F.B.].

(*k*) (1922) 49 I.A. 228, 236, 44 All. 368, 375-376, 67 I. C. 569, ('22) A. A. 247.

(*l*) *Ram Singh* v. *Chet Ram* (1919) 41 All. 529, 51 I. C. 119, ('19) A. A. 415.

(*m*) (1926) 53 I.A. 204, 48 All. 518, 98 I.C. 1031, ('26) A.PC. 105.

(*n*) *Ram Ratan* v. *Lachman Das* (1903) 30 All. 460 ; *Mathura* v. *Rajkumar* (1921) 6 Pat. L. J. 526, 62 I. C. 132, ('21) A. P. 447 [F.B.] ; *Hari Prasad* v. *Sourendra* (1922) 1 Pat. 506, 525-526, 66 I. C. 945, ('22) A. P. 450.

attachment and sale of the entire interest of the father as well as the son in the joint family property, and the sale will bind the son though he was not made a party to the suit, unless the debt contracted by the father was for an immoral purpose. Even if the sons were originally impleaded in the suit and the suit was afterwards withdrawn against them, the decree against the father, can be executed against the son's interests in the joint family property (*o*). **S. 292**

If there is a partition after the decree, according to one view, the decree may be executed against the *joint family property* including the son's interest therein (*p*). According to another view, the creditor should bring another suit against the sons, obtain a decree against them which would be limited to the shares allotted to them on partition and then attach and sell the shares, unless the partition was not *bona fide* and was made with intent to defraud the general body of creditors, in which case the decree may be executed against the joint family property (*q*).

The first view set forth above proceeds on the ground that the sons are represented by the father in the case of a decree obtained before partition. The reasons for the second view have thus been stated by the High Court of Madras: "At the date of execution the property now in question had ceased to be joint family property and the cases referred on the other side--11 Bom. 37, 4 I.A. 47, 6 I.A. 88, 13 Cal. 21 P.C. 28 Bom. 383-- were all cases in which the property remained joint and so subject to alienation by the father in satisfaction of his debt" (*q*).

If there is a partition during the pendency of the suit against the father, either the son can be made a party and a decree would follow as in sub-sec. (*2*) below or the suit will proceed without the son and the decree will follow as above (*r*).

Explanation.- A partition is not *bona fide* and may be described as one made with intent to defraud creditors if it does not provide for the payment of the father's debts. It may not be proper to say that the partition is such merely because it was entered into either pending the creditor's suit or after

(*o*) *Krishnan* v. *Sami* (1940) Mad. 815, ('40) A.M. 544.

(*p*) *Kishan Sarup* v. *Brijraj* (1929) 51 All. 932, 955-56, 121 I. C. 257, ('29) A. A. 726; *Jageshwar* v. *Manni Ram* (1927) 2 Luck 561, 101 I.C. 907, ('27) A.O. 180; *Nanda Kishore* v. *Madan Lal* ('36) A. L. 64 ('decree before partition.')

(*q*) *Kameshwarammu* v. *Venkata Subba Row* (1915) 38 Mad. 1120, 24 I. C. 474, ('14) A.M. 328 [decree obtained before partition].

(*r*) See *Ragunandan Pershad* v. *Moti Ram* 6 Luck. 497, 119 I.C. 449, ('29) A.O. 406, where the decree was in Dec. 1926, the partition was in Aug. 1926 and the suit was probably prior to August. The date of the suit does not appear in the report. See also *Jawahar Singh* v. *Parduman Singh* (1933) 14 Lah. 399, 141 I. C 424, ('33) A.L. 116, where the partition was in Feb. 1927 but the date of the money decree against the father does not appear.

S. 292 the decree in that suit, and with the object of avoiding attachment of the joint family property in execution of the decree in the creditors' suit (*s*).

Where a partition between a father and son was not a mere colourable transaction and was in accordance with the proper shares in the property it is not liable to be impeached under section 53 Transfer of Property Act, although it was entered into with a view to prevent attachment of the son's share in execution of decrees obtained against the father after the partition. Only the father's share can be proceeded against (*t*).

(*2*) *Suit against father and son.*—Under similar conditions the creditor may sue *both father and son*, and obtain a decree against them for the debt due to him (*u*). It is open to the son in such a suit to show that the debt was incurred by the father (*v*) for an immoral purpose and to resist a decree against his share on that ground. It is not necessary for the son to show that the immoral purpose was known to the lender (*w*). But a distinct connection must be established between the debt and the father's immorality (*x*). If he omits to do so, he will be precluded in execution proceedings from contending that the debt was contracted for an immoral purpose (*y*).

The son may be joined as a party to a suit on a promissory note executed by the father alone (*z*). See s. 240 (*4*).

If there is a partition between the father and the son after the debt has been incurred but before any suit is filed the creditor can reach the share allotted to the son on partition only by a suit to which the son is a party (*vide* s. 290 (6) and cases cited therein). Such a suit would in the ordinary course be one both against the father and the son. The decree against the father would be the usual decree but against the son it would be limited to the share allotted to him on partition.

Even where the debt is a secured debt, the creditor may sue both father and son. If the mortgage is binding on the son also, being executed for an antecedent debt [s. 256 (*2*)], or other legal necessity (s. 242) a mortgage decree follows. But if the mortgage was not effected for an antecedent debt or other legal necessity there will be a mortgage decree in Madras and Bombay but not in other provinces against the father but a money

(*s*) *Balusami Ayyar, In re* (1928) 51 Mad. 417, 425, 112 I.C. 541, ('28) A.M. 735 [F.B.]; *Subramania* v. *Sabapathy* (1928) 51 Mad. 361, 368, 110 I. C. 141, ('28) A. M. 657; *Gaya Prasad* v. *Murlidhar* (1928) 50 All. 137, 104 I. C. 406, ('27) A. A. 714; *Kishan Sarup* v. *Brijraj* (1929) 51 All. 932, 936-37, 121 I. C. 257, ('29) A.A. 726.

(*t*) *Sehwebo* v. *Subbiah alias Shanmugham Chettiar* (1945) Mad. 138.

(*u*) *Ramasami* v. *Ulaganatha* (1889) 22 Mad. 49 [F.B.]; *Narayanan* v. *Veerappa* (1917) 40 Mad. 581, 582, 35 I.C. 918, ('17) A.M. 989; *Debendra* v. *Fyzabad Bank* (1924) 3 Pat. 63, 75 I.C. 53, ('24) A. P. 94.

(*v*) *Sat Narain* v. *Behari Lal* (1925) 52 I.A. 22, 6 Lah. 1, 84 I. C. 883 ('25) A.PC. 18.

(*w*) *Lakshmanaswami* v. *Raghava Charjulu* (1943) Mad. 717, 210 I.C. 98, ('43) A.M. 892.

(*x*) *Brijmohan* v. *Mahabeer* (1936) 63 Cal. 194.

(*y*) *Krishnanand* v. *Raja Ram* (1922) 44 All. 393, 66 I.C. 150, ('22) A.A. 116.

(*z*) *Ramasamayyan* v. *Virasami* (1898) 21 Mad. 222, 224; *Narayan* v. *Veerappa* (1917) 40 Mad. 581, 582, 35 I. C. 918, ('17) A. M. 989, *supra*; *Ramphul Singh* v. *Dej Narain* (1882) 8 Cal. 517.

decree against the son (s. 259 and s. 260) conditional on the debt not being realised by the sale of the father's share (*a*). See sec. 296 (i). If there is a partition between the father and the son after the mortgage, the son is still liable to pay the debt unless it is incurred for illegal and immoral purposes. In such a case the son ought to be a party to the suit. As the father does not represent him, the equity of redemption in his share of the property would not be lost unless he is impleaded and is given an opportunity to redeem. If he is not impleaded in the suit against the father, there ought to be another suit against him or other proceeding giving him an opportunity to redeem before he is deprived of his share. There can be no objection to the maintainability of such a suit. If he obstructs delivery of the property to the purchaser, he may be allowed an opportunity to redeem in those proceedings. In such cases, he must redeem the whole of the debt and not merely his own share (*b*). The son himself may file a suit for a declaration that the mortgage is not binding on him [*vide* s. 296 (*1*)]. **S. 292**

(*3*) *Son alone cannot be sued during father's lifetime.*—Where a debt has been contracted by the father for his personal benefit, he is primarily liable to discharge it. Such being the case, the son alone cannot be sued during the father's lifetime (*c*).

(*4*) *Suit against the son after father's death there being no suit against the father.*—In such a case, the creditor may file a suit and obtain a decree against the son, and attach the entire interest of the father and son in the coparcenary property, and have it sold in execution of the decree. The son being under a pious obligation to pay the father's debts, he cannot claim the benefit of survivorship. It is assumed that the debt contracted by the father was not for an unlawful or immoral purpose. Such a suit may be filed and a decree obtained against the son, even if, at the time of the suit, the grandfather is living. The decree may be executed against the share of the father and the son in the ancestral property (*d*).

(*5*) In the case of a money claim there cannot be a second suit against the son after the father's death where a decree had been obtained against the father during his lifetime. The decree can only be executed against the son, whether the son is regarded as being represented by the father or as a representative of the father within the meaning of sec. 53 of the Code of Civil Procedure (*e*), see s. 294 (C). The Madras (*f*)

(*a*) *Kandasami* v. *Kuppu* (1920) 43 Mad. 421, 55 I. C. 320, ('20) A. M. 479; *Sami* v. *Poonnammal* (1897) 21 Mad. 28.

(*b*) *Trimbak* v. *Narayan Damodar* (1884) 8 Bom. 481; *Hem Raj* v. *Bashesher Das* (1933) 14 Lah. 22, 147 I.C. 693, ('33) A.L. 253.

(*c*) *Periasami* v. *Seetharama* (1904) 27 Mad. 243, 247 [F.B.].

(*d*) *Devi Das* v. *Jada Ram* (1934) 15 Lah. 50, 147 I.C. 225, ('33) A. L. 857, dissenting from *Binda Parsad* v. *Raj Ballabh* (1926) 48 All. 245, 91 I. C. 785, ('26) A. A. 220.

(*e*) *Venkatanarayana* v. *Somaraju* (1937) Mad. 880 (F.B.), 171 I.C. 101, ('37) A.M. 610.

(*f*) *Periasami* v. *Seetharama* (1904) 27 Mad. 243 [F. B.].

Ss. 292, 293 and Allahabad decisions under the Code of Civil Procedure, 1882, allowing a second suit against the son on the judgment debt are of no practical importance.

292A. Where two brothers contracted a debt in respect of a joint family business the creditor is entitled to a decree against them after their separation in status by a partition suit (*g*).

293. Limitation.—(*1*) *Against father.*—Where the suit is brought against the father alone to recover a debt contracted by him for his own personal benefit, the period of limitation for the suit is, in the case of an unsecured debt, 3 years from the date when the debt becomes due and payable [Limitation Act, Sch. I, arts. 57, 58, 66, 67].

(*2*) *Against son.*—It has been held by the High Court of Madras that whether the suit is brought both against father and son, or it is brought against the son after the father's death, there is only one cause of action which arises equally against father and son at the time when the debt is due and payable, and limitation runs equally against them from that date (*h*). It has accordingly been held by that Court that a suit against the son after the father's death is governed by the same article of the Limitation Act as would be applicable if the suit where brought against the father himself, the reason given being that the suit against the son is as much a suit on a contract (that is, the father's contract of debt) as a suit against the father (*i*). According to this view, the period of limitation, in the case of an unsecured debt, is 3 years from the date when the debt becomes due and payable [Limitation Act, Sch. I, articles 57, 58, 66, 67]. On the other hand, it has been held by the High Court of Allahabad that the son's liability is not governed by the same article as the father's liability, but by article 120, the reason given being that the son not being a party to the contract, could not be sued on the contract. His liability arises from the pious obligation to pay the father's debt, and the only article applicable to the case is article 120. That article applies to suits for which no period of limitation is provided specifically by the Act, and the period prescribed by that

(*g*) *Ram Rakhan* v. *Rajalal* (1944) Luck. 605.

(*h*) *Mallesam* v. *Jugala* (1900) 23 Mad. 292, [F. B.].

(*i*) *Periasami* v. *Seetharama* (1904) 27 Mad. 243 [F.B.].

article is 6 years from the date when "the right to sue accrues." Though there is a difference of opinion between the two High Courts as to the *period* of limitation for a suit against the sons, they are both agreed that the *starting point of limitation* in respect of the liability both of the father and the son is the same, namely, the date on which the debt becomes due and payable (*j*). A Full Bench of the Calcutta High Court has held in a case in which a suit was brought against the sons after the father's death, that the case was governed by article 120 of the Limitation Act, but the question whether "the right to sue" accrued on the date on which the debt incurred by the father becomes due and payable, or the date when the creditor after exhausting all his remedies against the father finds that the debt or a portion of it is still unsatisfied, or the date of the death of the father, was left open (*k*). **S. 293**

(*3*) *Where debt is secured by a charge.*—Where a debt contracted by the father is secured by a simple mortgage of joint family property or by a charge on such property created by him alone, and a suit is brought *to enforce the mortgage or charge*, then whether the suit is against the father alone, or both against father and son, or against the son after the father's death, the article of the Limitation Act governing the *father's* liability is article 132 which prescribes a period of 12 years from the date when the money sued for becomes payable. But the *son*, not being a party to the mortgage, is not bound by the *mortgage*, and art. 132 does not apply to his case. He is liable, however, for the mortgaged-debt *qua* debt, and his liability is governed, according to the Madras decision referred to in sub-sec. (*2*), by one of the articles which prescribe a period of 3 years, and, according to the Allahabad and Calcutta decisions referred to in the same sub-section, by article 120 which prescribes a period of 6 years. According to the Madras decision, the mortgagee's suit against the son would be barred if brought more than 3 years after the accrual of the cause of action; according to the Allahabad and Calcutta decisions, it would be barred if brought more than 6 years after that date (*l*).

(*j*) *Narsingh* v. *Lalji* (1901) All. 23 206. See *Maharaj Singh* v. *Balwant Singh* (1906) 28 All. 508, 516.

(*k*) *Brijnandan* v. *Bidya Prasad* (1915) 42 Cal. 1068, 29 I.C. 629, ('16) A.C. 279.

(*l*) *Brijnandan* v. *Bidya Prasad* (1915) 42 Cal. 1068, 29 I.C. 629, ('16) A.C. 279; *Chandradeo Singh* v. *Mata Prasad* (1909) 31 All. 176, 179, lines 4-10, 1 I.C. 479 [F.B.].

S. 294 **294. Sale of coparcenary property in execution of decree against father alone.**– The law on the subject-matter of this and the next section was first expounded by their Lordships of the Privy Council in *Muddan Thakoor* v. *Kantoo Lall* (*m*). The judgment in that case was summarized by their Lordships in *Suraj Bunsi Koer* v. *Sheo Proshad* (*n*) in the following terms :—

(a) "That where joint ancestral property *has passed out of a joint family*, either (1) under a conveyance executed by a father in *consideration of an antecedent debt*, *or* in order to raise money to pay off *an antecedent debt* [s. 295] *or* (2) *under a sale in execution* of a decree for the father's debt [s. 294C] his sons, by reason of their duty to pay their father's debts, cannot *recover* that property, unless they show that the debts were contracted for immoral purposes, and that the purchaser had notice that the debts were so contracted" ; and

(b) "that the purchasers at an execution sale, being strangers to the suit, if they have not notice that the debts were so contracted, are not bound to make enquiry beyond what appears on the face of the proceedings."

The following passage from the judgment of their Lordships of the Privy Council in *Mst. Nanomi Babuasin* v. *Modun Mohun* (*o*) has now become classical:—

"Destructive as it may be of the principle of independent coparcenary rights in the sons, the decisions have for some time established the principle that the sons cannot set up their rights against their father's alienation for an antecedent debt, or against his creditors' remedies for their debts, if not tainted with immorality. On this important question of the liability of the joint estate their Lordships think that there is now no conflict of authority."

When the father became a Christian and was afterwards reconverted to Hinduism a sale in execution of a money decree against him does not pass the minor son's share in the

(*m*) (1874) 14 Beng. L. R. 185, 1 I. A. 333.
(*n*) 6 I A. 88, 106, 5 Cal. 148, 171.
(*o*) (1886) 13 Cal. 21, 35, 13 I.A. 1, 17, 18.

family property, as the joint family was broken up when the father became a convert and there can be no reunion with the minor son (*p*).

294A. Sons' remedies before sale.—(*1*) A debt contracted by the father *for his own personal benefit* may be secured by a mortgage of joint family property or it may be unsecured. In either case the creditor may obtain a *money decree* against the father alone, and may attach and bring to sale the entire joint family property including the sons' interest therein in execution of the decree. The sons being under a pious obligation to pay the father's debt, cannot object to the attachment of their interest in the property on the ground that the debt was not for the benefit of the family. Nor can they object on the ground that they were not parties to the suit in which the decree was passed. *Prima facie* a decree obtained against *A* cannot be executed by attachment and sale of *B*'s property. But the position of sons in a joint Hindu family is, by reason of their pious duty to pay their father's debt, very different from that of an ordinary third party. The sons being under a pious obligation to pay the father's debt, the entire joint family property is liable to be attached and sold in execution of the decree against the father, *unless they show that the debt for which the decree was passed was incurred by the father for an immoral or illegal purpose* or successfully challenge the existence of the debt on which the decree is based (*p*1). There are two courses open to the sons in such a case. They may come in under O. 21, r. 58, of the Code of Civil Procedure, 1908, and object to the attachment and sale on either of the grounds mentioned above. The party against whom the order is made will then, under O. 21, r. 63, be entitled to bring a suit in which the whole question as to whether there was a debt or not, or whether it was immoral or not, will be determined. If no such suit is filed within one year from the date of the order, the order will be conclusive (*q*); [see Limitation Act, 1918, Sch. I, art. 11]. The sons, however, are not bound to proceed under O. 21, r. 58. They may bring a suit against the decree-holder for

(*p*) *Vella Venkatasubbayya* v. *Vella Venkatramayya* (1944) Mad. 33.

(*p*1) *Lakshmadu* v. *Ramudu & Ors.* (1940) Mad. 123, 187 I.C. 816, ('39) A.M. 687.

(*q*) *Indar Pal* v. *The Imperial Bank* (1915) 37 All. 214, 28 I.C. 593, ('15) A.A. 126; *Mohan Lal* v. *Bala Prasad* (1922) 44 All. 619, 69 I.C. 751, ('22) A.A. 310; *Hammant Kashinath* v. *Ganesh Annaji* (1919) 43 Bom. 612, 51 I.C. 612, ('18) A.B. 13; *Madhusudan* v. *Iswari Dayi* (1921) 48 Cal. 341, 61 I.C. 25, ('21) A.C. 152; *Ram Rattan* v. *Basant Rai* (1921) 2 Lah. 263, 64 I.C. 121, ('21) A.L. 205.

S. 294A a declaration that they are not bound by the decree and for an injunction restraining the decree-holder from selling the entire property, but their share will not be released from attachment, *unless they show that the debt for which the decree was obtained was tainted with immorality* (*r*). And in such a suit *ad valorem* court fees must be paid (*s*). It has been held in Bombay that the decree-holder himself may apply under O. 21, r. 66 (2) (e) of the Civil Procedure Code to include the sons' interest in the proclamation of sale, and that the Court may on such an application deal with the sons' objection after giving notice to them (*t*).

(*2*) In the case of a mortgage by the father of joint family property, the creditor may obtain a *mortgage decree* against the father alone. Where the property is put up for sale in execution of a *mortgage decree*, no attachment takes place as in the case of a money decree. The sale is held in such cases under the final decree for sale passed in the mortgage suit. But the sale is always notified by proclamation under O. 21, r. 66, and the sons may at the time of sale give public notice to all intending purchasers that there was in reality no debt owing from the father or that the debt for which the decree was passed was contracted by the father for an immoral or illegal purpose. Where such notice is given, and the property is purchased after such notice, though it may be by a stranger to the suit, the sale will be set aside, if the sons show, in a suit subsequently brought by them, that the debt was contracted for an immoral purpose; for the purchaser, though he may be a stranger to the suit, will then be taken to have had notice, actual or constructive, of the sons' objections, and therefore to have purchased with notice of the sons' claim and subject to the result of the sons' suit (*u*); see s. 294B (*1*), para. 2. But the sons are not bound to wait until the property is sold. They may bring a suit against the mortgagee for a declaration that they are not bound by the decree and for an injunction restraining the mortgagee from selling the entire property.

(*r*) *Karan Singh* v. *Bhup Singh* (1905) 27 All. 16 [F.B.]; *Abdul Karim* v. *Ram Kishore* (1925) 47 All. 421, 86 I.C. 837, ('25) A.A. 327; *Sardari Lal* v. *Bharat National Bank* (1931) 12 Lah. 495, 130 I.C. 836, ('31) A.L. 716; *Pirthi-Singh* v. *Manchand* (1935) 16 Lah. 1077, 156 I. C. 539, ('35) A. L. 761.

(*s*) *Vinayakrao* v. *Mankunwarbai* (1943) Nag. 440, 202 I.C. 643, ('43) A.N. 70.

(*t*) *Ramchandra* v. *Bhagwant* (1929) 53 Bom. 777, 121 I.C. 435, ('29) A.B. 465.

(*u*) *Suraj Bansi Koer* v. *Sheo Proshad* (1878) 5 Cal. 148, 173, 6 I.A. 88, 106 (debt held to be immoral); *Bhagbut Pershad* v. *Girja Koer* (1888) 15 Cal. 717, 724, 15 I.A. 99, 104 (debt held not to be immoral).

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Where such a suit is brought, the question arises whether the sons' suit must fail unless they can establish that the debt for which the decree was passed was for an immoral purpose, as they have to do in a suit to set aside a *money* decree [see sub-sec. (*1*)], or whether they are entitled to succeed if the mortgage was neither for legal necessity nor for the payment of an antecedent debt, *without* showing that the debt was contracted for an immoral purpose. It has been held in several cases that as in the case of a simple money decree, so in the case of a mortgage decree, the sons are not entitled to go behind the decree, except for the purpose of showing that the debt was tainted with immorality (*v*). The cases referred to above were prior in date to the Privy Council case of *Brij Narain* v. *Mangla Prasad* (*w*), decided in 1923. In that case the Judicial Committee laid down five propositions (see note 1 to s. 295), of which the following three are material:—

(1) The managing member of a joint undivided estate cannot alienate or burden the estate *qua* manager except for purposes of necessity [see. s. 242].

(2) If he is the father and the other members are the sons he may, by incurring debt, so long as it is not for an immoral purpose, lay the estate open to be taken in execution proceedings upon a decree for payment of that debt [see s. 294].

(3) If he purports to burden the estate by mortgage, then unless that mortgage is to discharge an antecedent debt, it would not bind the estate [see s. 295].

In Oudh and Punjab (*x*), it has been held that the word "debt" in the second proposition refers not only to a simple money debt but also to a mortgage debt, and that the sons' suit must fail unless they establish that the debt was for an immoral purpose. This view was followed in an Allahabad case, though with some hesitation (*y*). However, a Full

(*v*) *Beni Madho* v. *Basdeo Patak* (1890) 12 All. 99; *Bhawani Baksh* v. *Ram Dai* (1891) 13 All. 216; *Pem Singh* v. *Partab Singh* (1892) 14 All. 179 [F.B.]. See also *Chandradeo* v. *Mata Prasad* (1909) 31 All. 176, 1 I.C. 479; *Raja Raghunandan* v. *Kumar* (1931) 10 Pat. 124, 126 I.C. 377, ('30) A.P. 521.

(*w*) (1924) 51 I.A. 129, 46 All. 95, 77 I.C. 689, ('24) A.PC. 50.

(*x*) *Gouri Shankar* v. *Jang Bahadur* (1924) 27 Oudh cases, 124, 79 I.C. 1008, ('24) A.O. 394; *Nand Lall* v. *Umrai* (1926) 1 Luck. 360, 93 I.C. 655, ('26) A.O. 321; *Jogindra Singh* v. *The Punjab & Sindh Bank Ltd., Amritsar* (1940) 21 Lah. 96, 186 I.C. 357, ('39) A.L. 585.

(*y*) *Lal Singh* v. *Jagraj Singh* (1928) 50 All. 546, 107 I.C. 693, ('28) A.A. 86.

Ss. 294A, 294B

Bench of the Allahabad High Court (*z*) disapproved of that view, and held that the word "debt" in the second proposition contemplated a simple money debt, and not a mortgage debt; further, that having regard to the first and third propositions, a mortgage by the father could only be upheld if it was made either for a legal necessity or for an antecedent debt, and in no other case, and that if mortgagee failed to prove that the debt was contracted for either of those two purposes, the sons were entitled to have the mortgage decree set aside *without* showing that the debt was for immoral purposes.

In the Allahabad case above referred to the Full Bench consisted of three Judges. The view stated above is the view taken by two of the judges. The third judge was of opinion that the word "debt" in the second proposition included a mortgage debt but that the proposition did not apply as the property had not yet been sold. In the view of the learned Judge the words "lay the estate open to be taken in execution proceedings" in proposition two, contemplated cases where the property had already been sold, and that the mere passing of a decree cannot be said to "lay the estate open to be taken in execution proceedings." On these grounds the learned Judge arrived at the same conclusion as the other two Judges. The other two Judges, however, refrained from expressing any opinion as to the interpretation to be put upon those words. It is very important to note that the ruling in the Full Bench case applies only where (1) the suit is to set aside a *mortgage* decree, and (2) the suit is brought *before sale.*

In a recent case the Bombay High Court agreed with the Full Bench decision of the Allahabad High Court and differred from the Lahore High Court (*a*).

294B. Son's rights after sale.—(*1*) *Money decree against father.*—Where the father has contracted a debt *for his own personal benefit,* the creditor may obtain a *money decree against the father alone,* and may enforce the decree by attachment and sale of the entire coparcenary property *including the sons' interest therein.* The sons, *though not parties to the suit,* are bound by the sale by reason of their pious duty to pay their father's debt, and they cannot recover their share of the property unless they prove (and the burden lies upon them to prove) that the debt was contracted by the father for an immoral or illegal purpose. This rests on the theory that as the father can effect a sale *without suit* of the entire joint family property including his sons' interest therein in favour of the creditor for the payment of an antecedent debt [s. 295], so the creditor may legally procure a sale of it *by suit* (*b*). The fundamental principle is that where joint family

(*z*) *Jagdish Prasad* v. *Hoshyar Singh* (1929) 51 All. 136, 115 I.C. 775, ('28) A.A. 596 [F.B.].

(*a*) *Bharamappa Murdappa* v. *Hanmantappa Tippanna* (1943) Bom. 568, ('43) A. B. 451.

(*b*) *Mst. Nanomi Babuasin* v. *Modun Mohun* (1886) 13 Cal. 21, 36, 13 I.A. 1; *Ramasamayyan* v. *Virasami* (1898) 21 Mad. 222, 224; *Kunhali* v. *Keshava* (1888) 11 Mad. 64, 76.

property is *sold* in execution of a decree, though obtained against the father alone, and for a debt contracted by him for his own personal benefit, the sons cannot claim to recover their share of the property unless they show that the debt was contracted by the father to the knowledge of the lender (*c*) for an immoral or illegal purpose (*d*) and that the purchaser had notice that it was so contracted (*e*). S. 294B (1)

A distinction has, however, been made by the Judicial Committee between the case where the purchaser at the execution sale is a stranger to the suit and the case where he is the decree-holder himself. The two leading cases on the subject are *Muddun Thakoor* v. *Kantoo Lall* (*f*) and *Suraj Bansi Koer* v. *Sheo Proshad* (*g*). It has been held by the Judicial Committee in those cases that *where the purchaser is a stranger to the suit*, the sons are not entitled to recover their share unless they prove (1) that the debt was contracted for an immoral or illegal purpose, *and also* (2) that the purchaser had notice that it was so contracted. It is not necessary for the purchaser to show that he made inquiry before the sale as to the nature of the debt. The purchaser in execution is not bound to go behind the decree (*h*) or further back than to see that there was a decree against the father, and that the property sold was properly liable to satisfy the decree if the decree had been properly passed against the father; if he makes an inquiry to that extent and then purchases the property *bona fide* and for value, the sale is not liable to be set aside at the suit of the sons, and the purchaser is entitled to the entire property including the sons' interest therein. "Purchasers at an execution sale, being strangers to the suit, if they have not notice

(*c*) *Sat Narain* v. *Behari Lal* (1925) 52 I.A. 22, 6 Lah. 1, 84 I.C. 883, ('25) A.PC. 18; *Minakshi Naidu* v. *Immudi* (1889) 12 Mad. 42, 16 I.A. 1 (original creditor advanced the loan bona fide).

(*d*) *Muddun Thakoor* v. *Kantoo Lall* (1874) 14 Beng. L. R. 187, 200, 1 I.A. 321, 334; *Suraj Bunsi Koer* v. *Sheo Proshad* (1878) 5 Cal. 148, 171, 6 I.A. 88, 106; *Muttayan Chettiar* v. *Sangili* (1882) 6 Mad. 1, 9 I.A. 128; *Bhagbut Pershad* v. *Girja Koer* (1888) 15 Cal. 717, 724, 15 I.A. 99, 105; *Minakshi* v. *Immudi* (1889) 12 Mad. 142, 16 I.A 1; *Sripat Singh* v. *Tagore* (1917) 44 Cal. 524, 44 I. A. 1, 39 I. C. 252, ('16) A.PC. 220; *Brij Narain* v. *Mangla Prasad* (1924) 51 I.A. 129, 46 All. 95, 77 I.C. 689, ('24) A.PC. 50; *Karan Singh* v. *Bhup Singh* (1905) 27 All. 16 [F.B.]. See also cases cited in sub-secs. (2), (3), (4) and (5); *Bhubaneshwar Prasad Narayan Singh* v. *Bihari Lal* (1935) 14 Pat. 436, 156 I. C. 350, ('35) A. P. 205.

(*e*) *Suraj Bansi Koer* v. *Sheo Proshad* (1878) 5 Cal. 148, 171, 6 I. A. 88, 106; *Bhagbat Pershad* v. *Girija Koer* (1888) 15 Cal. 717, 724, 15 I.A. 99, 105; *Jahan Singh* v. *Hardat Singh* (1935) 57 All. 357, 152 I.C. 487, ('35) A.A. 247; *Krishnaji* v. *Vithal* (1888) 12 Bom. 625.

(*f*) (1874) 14 Beng. L. R. 187, 1 I.A. 321.

(*g*) (1878) 5 Cal. 148, 171, 6 I.A. 88, 106. See also *Muttayan Chettiar* v. *Sangili* (1882) 6 Mad. 1, 9 I. A. 128, where it was held that the law in the Madras Presidency is not different.

(*h*) In *Mahabir Prasad* v. *Basdeo Singh* (1884) 6 All. 234, 238, it was held that the decree must be read with the plaint, so that the purchaser will be deemed to have notice of the allegations in the plaint.

S. 294B (1) that the debts contracted for an immoral purpose were so, are not bound to make inquiry beyond what appears on the face of the proceedings." These decisions have been followed in India in the under-mentioned cases (*i*). The principle on which these decisions rest is that one who has *bona fide* purchased joint family property under an execution, and *bona fide* paid a valuable consideration, is protected against the suit of the sons seeking to set aside the sale and to recover their share of the property.

But it is different if the decree-holder is himself the purchaser. In that case, all that is necessary for the sons to prove, to entitle them to recover their share, is that the debt for which the decree was passed was contracted for an immoral purpose. It is not necessary for them to prove the further fact that the purchaser had notice that the debt was so contracted. The reason is that where the purchaser is the decree-holder in the suit, he does not stand in the same position as a stranger to the suit, and he cannot therefore protect himself under the plea of being a purchaser without notice (*j*). It is also well established that even if the purchaser is a *stranger* to the suit, the sale will be set aside to the extent of the sons' interest in the property, if *before* the sale took place objection was taken by the sons that the debt for which the decree was obtained was contracted for an immoral purpose, and it is eventually proved that the debt was so contracted. The reason is that in such a case the purchaser will be taken to have had notice, actual or constructive, of the sons' objection, and, therefore, to have purchased with notice of the sons' claim and subject to the result of any suit that may be brought by the sons to recover their share of the property (*k*).

The same principles apply where the sale is sought to be set aside on the ground *that there was in reality no debt* owing

(*i*) *Bhawani Baksh* v. *Ram Dai* (1891) 13 All. 216, 223; *Trimbak* v. *Narayan* (1884) 8 Bom. 481; *Maharaj Singh* v. *Balwant Singh* (1906) 28 All. 508, 518-519; *Krishnaji* v. *Vithal* (1888) 12 Bom. 625; *Jahan Singh* v. *Hardat Singh* (1935) 57 All. 357, 152 I.C. 487, ('35) A.A. 247.

(*j*) *Luchmun Dass* v. *Giridhur* (1880) 5 Cal. 855; *Ramphul Singh* v. *Deg Narain* (1882) 8 Cal. 517, 522; *Beni Parshad* v. *Puran Chand* (1896) 23 Cal. 262; *Natasayyan* v. *Ponnusami* (1893) 16 Mad. 99, 103; *Ramasamayyan* v. *Virasami* (1898) 21 Mad. 222; *Sripat Singh* v. *Tagore* (1917) 44 I. A. 1, 44 Cal. 524, 39 I. C. 352, ('16) A.P.C. 220; *Trimbak Balkrishna* v. *Narayan Damodar* (1884) 8 Bom. 481 [the purchaser was the decree-holder's son]; *Joharmal* v. *Eknath* (1900) 24 Bom. 343; *Ram Chandar* v. *Muhammad* (1923) 45 All. 545, 73 I.C. 656, ('23) A.A. 591.

(*k*) *Suraj Bunsi Koer* v. *Sheo Proshad* (1878) 5 Cal. 148, 6 I. A. 88 [debt held to be immoral]; *Bhagbut Pershad* v. *Girja Koer* (1888) 15 Cal. 717, 724, 15 I. A. 99, 105 [debt held not to be immoral]; *Mahabir Prashad* v. *Basdeo* (1884) 6 All. 234 [debt held to be immoral]. See also *Maharaj Singh* v. *Balwant Singh* (1906) 28 All. 508, 518-519 [debt held to be immoral].

by the father and that the decree was obtained by collusion between the creditor and the father. In such a case, if the purchaser be the decree-holder himself, the sons must show, to entitle them to succeed, that there was no debt in fact, and that is all that is necessary for them to prove (*l*). But if the purchaser be a stranger to the suit, the sons must show not only that there was no debt due by the father, but also that the purchaser had notice that there was no such debt (*m*). **S. 294B (1)**

The position, then, is that where joint family property is sold in execution of a decree against the father, then if the purchaser is the decree-holder himself, the sons are entitled to recover their interest merely by proof of the immorality or non-existence (*n*) of the debt. But if the purchaser is a stranger to the suit, they cannot recover their share unless they prove that the debt was contracted for an immoral or illegal purpose, *and also* that the purchaser had notice that it was so contracted.

The distinction between the case where the purchaser is a stranger and where he is the decree-holder himself was, as stated above, laid down by the Judicial Committee in *Muddun Thakor*'s case and *Suraj Bunsi Koer*'s case. In some later cases, however, even where the purchaser was a stranger to the suit, the Judicial Committee appears to have laid down in general terms and without any reference to the necessity of notice, that the sons could successfully impeach a sale *merely by proof of the immorality of the debt* (*o*). But in all these cases, the fact of immorality had been disproved, so that the question of notice could not have arisen. Thus *Mst. Nanomi Babuasin* v. *Modun Mohun* (*p*), which was one of such cases, the Judicial Committee observed: "All the sons can claim is that, not being parties to the sale or execution proceedings, they ought not to be barred from trying the fact or the nature of the debt in a suit of their own. *Assuming* they have such a right, it will avail them nothing unless they can prove that the debt was not such as to justify the sale." The debt in that case was held not to be immoral, and the question of notice did not arise. In *Sripat Singh* v. *Tagore* (*q*), their Lordships said: "The property in question was joint property, governed by the Mitakshara law. By that law a judgment against the father of the family cannot be executed against the whole of the joint family property, *if the debt in respect of which the judgment has been obtained was a debt incurred for illegal or immoral purposes.* In every other event it is open to the execution creditor to sell the whole of the estate in satisfaction of the judgment obtained against the father alone." In this case also it was found that the debt was not incurred for an immoral purpose; moreover, the decree-holder himself

(*l*) *Beni Parshad* v. *Puran Chand* (1896) 23 Cal. 262; *Ramasamayyan* v. *Virasami* (1898) 21 Mad. 222.

(*m*) *Beni Parshad* v. *Puran Chand* (1896) 23 Cal. 262, 274-275; *Mahabir Prasad* v. *Basdeo Singh* (1884) 6 All. 234, 238.

(*n*) *Lakshmadu* v. *Ramudu & Ors.* (1940) Mad. 125, ('39) A.M. 867, 187 I.C. 816; *Maha Deo* v. *Rambir Singh* (1945) Lah. 67 [F.B.].

(*o*) *Mst. Nanomi Babuasin* v. *Modun Mohun* (1885) 13 Cal. 21, 13 I.A. 1; *Bhagbut Pershad* v. *Girja Koer* (1888) 15 Cal. 717, 724, 15 I.A. 105; *Minakshi* v. *Immudi* (1885) 12 Mad. 142, 16 I.A. 1; *Rai Babu Mahabir Pershad* v. *Markunda Nath* (1889) 17 Cal. 584, 17 I.A. 11.

(*p*) (1885) 13 Cal. 21, 36, 13 I.A. 1, 18.

(*q*) (1917) 44 Cal. 524, 532, 44 I.A. 1, 4, 39 I.C. 252, ('16) A.PC. 220.

S. 294B (1), (2) was the purchaser. In *Brij Narain* v. *Mangla Prasad* (r), their Lordships, after reviewing the earlier cases on the subject, laid down five propositions of which the second was as follows: "If he is the father and the other members are the sons, he may, by incurring debt, *so long as it is not for an immoral purpose*, lay the estate open to be taken in execution proceeding upon a decree for payment of that debt." But that was a case of a mortgage executed by the father for the payment of an antecedent debt and the question of notice was not referred to either in argument or in the judgment. In India too there have been cases in which it has been laid down that where the purchaser is a stranger to the suit, the sons can in a suit of their own successfully impeach the sale or resist the purchaser's suit for possession *merely by proof of the immorality of the debt.* But in these cases also the fact of immorality had been disproved, and the question of notice did not therefore arise (s).

Illustrations.

(a) *A* and his son *B* are members of a joint family. *A* is indebted to *C* in the sum of Rs. 5,000. *C* obtains a personal decree against *A* alone, and in execution of the decree attaches the whole coparcenary property belonging to the joint family. *B* objects to the attachment of his interest in the property on the ground that the moneys borrowed by his father *A* from *C* were borrowed for an immoral purpose. It is proved that the amount was borrowed for an immoral purpose. The Court will set aside the attachment to the extent of the son's interest. Suppose now that *B* does not object to the attachment, and that the whole property including *B*'s interest is sold in execution of the decree, and it is purchased by *C*, the decree-holder, and *B* sues *C* to set aside the sale on the ground that the debt contracted by his father was for an immoral purpose. If the son succeeds in showing that the debt was so contracted, the sale will be set aside to the extent of the son's interest in the property. If the son fails to show that the debt was immoral, the sale will be upheld in its entirety. But if the property is purchased by a stranger to the suit, the son cannot recover his share unless he proves not only that the debt was contracted for an immoral purpose, but that the purchaser had notice that it was so contracted.

(b) *A* and his son *B* are members of a joint family. *C* obtains a personal decree against *A* for Rs. 5,000 borrowed by *A* from *C* for his personal benefit, but not for an immoral purpose. *A* dies without paying the amount of the decree. *C* may, after *A*'s death, attach not only *A*'s share but also *B*'s share in the joint property, in other words attach the entire joint family property, and have the same sold in execution of the decree. The debt not having been contracted for an immoral purpose, the son's right to take by survivorship gives way to the supreme obligation to pay the father's debt. But if the debt was contracted for an immoral purpose, *C* could not after *A*'s death attach the interest either of *A* or *B*. The reason is that, as regards *A*'s interest, it will pass by survivorship to *B* [s. 289 (*2*)], and as regards *B*'s interest, it cannot be held liable, the debt being of an immoral character.

(*2*) *Mortgage decree against father.*—The above rules apply not only to a sale in execution of a *money decree* against the father, but to a sale in execution of a *mortgage decree* against him. This happens when the mortgage executed by the father is neither for legal necessity nor for the payment of an antecedent debt. If the mortgage is created either for legal

(r) (1924) 51 I.A. 129, 139, 46 All. 95, 104, 77 I.C. 689, ('24) A.P.C. 50.

(s) *Mata Din* v. *Gaya Din* (1909) 31 All. 599, 3 I.C. 24 [purchaser's suit for possession]; *Dulip Narain* v. *Parmaoti* (1920) 42 All. 58, 67 I.C. 98, ('20) A.A. 310; *Gajadhar* v. *Jadubir* (1925) 47 All. 122, 85 I.C. 31, ('25) A.A. 180; *Narayanacharya* v. *Narso Krishna* (1876) 1 Bom. 262.

necessity or for an antecedent debt not tainted with immorality, the mortgage itself binds the sons' interest in the property. If the mortgage is neither for legal necessity nor for an antecedent debt, the mortgage as such is not operative on the sons' interest, but the sons are nevertheless under a pious obligation to pay the mortgage debt *qua* debt. In such a case, if a decree is passed against the father on the mortgage for the sale of the whole of the mortgaged property, and the property is *sold* in execution of the mortgage decree, the sons, though not parties to the mortgage suit, are bound by the sale, unless they show that there was no debt owing by the father (*t*), or that the debt in respect of which the mortgage was executed was incurred by the father to the knowledge of the lender (*u*) for an immoral or illegal purpose (*v*) and that the purchaser not being the decree-holder had notice that the debt was so incurred (*vide* cases cited under 294B-1). See s. 296 (*1*), cl. ii. As to the sons' remedies *before* sale, see sec. 293 (*2*). **S. 294B (2), (3)**

Illustration.

A joint family consists of a father and sons. The father mortgages certain immoveable property forming part of the joint family properties to secure a loan raised by him. The loan is not raised either for a legal necessity or for payment of an antecedent debt. The mortgagee sues the father alone and obtains a decree for the sale of the mortgaged property. The property is sold in execution, and it is purchased by the mortgagee himself. The sons, being under a pious obligation to pay their father's debt, are bound by the sale unless they show that the debt was tainted with immorality. There is no distinction in such cases between a debt secured by a mortgage and an unsecured debt: *Gajadhar* v. *Jadubir* (1925) 47 All. 122, 85 I.C. 31, ('25) A. A. 180. Had the mortgage been for family necessities or for the discharge of an antecedent debt, *the mortgage itself* would have bound the son's interest in the mortgaged property and the sale in execution would have passed the sons' interest, not by virtue of the decree, but by *virtue of the mortgage.*

(*3*) *Execution purchaser's suit for possession.*—The rules laid down above apply also to a suit by a purchaser at an execution sale against the sons for possession of the property purchased by him (*w*).

(*t*) *Ramasamayyan* v. *Virasami* (1898) 21 Mad. 222.

(*u*) *Sat Narain* v. *Behari Lal* (1925) 52 I. A. 22, 6 Lah. 1, 84 I.C. 883, ('25) A.PC. 18.

(*v*) *Suraj Bunsi Koer* v. *Sheo Proshad* (1878) 5 Cal. 148, 6 I.A. 88; *Mst. Nanomi Babuasin* v. *Modun Mohun* (1885) 13 Cal. 21, 13 I.A. 1; *Bhagbut Pershad* v. *Girja Koer* (1888) 15 Cal. 717, 721, 724, 15 I.A. 99, 104, 105; *Lala Suraj Prosad* v. *Golab Chand* (1901) 28 Cal. 517; *Jamna* v. *Nain Sukh* (1887) 9 All. 493, 494; *Beni Madho* v. *Basdeo Patak* (1890) 12 All. 99; *Bhawani Bakhsh* v. *Ram Dai* (1891) 13 All. 216; *Pem Singh* v. *Partab Singh* (1892) 14 All. 179 [F.B.]; *Gajadhar* v. *Jadubir* (1925) 47 All. 122, 85 I.C. 31, ('25) A.A. 180; *Kunhali* v. *Keshava* (1888) 11 Mad. 64, 76; *Tribeni* v. *Ramesray* (1931) 10 Pat. 670, 136 I.C. 49, ('32) A.P. 80 [F.B.]; *Johan Singh* v. *Hardat Singh* (1935) 57 All. 357, 152 I.C. 487, ('35) A.A. 247.

(*w*) *Trimbak* v. *Narayan Damodar* (1884) 8 Bom. 481; *Mata Din* v. *Gaya Din* (1909) 31 All. 599, 3 I.C. 24.

S. 294B (4), (5)

(4) *Burden of proving immorality of debt.*—Where in respect of their share the sons claim to set aside a sale in execution of a decree against the father, the burden lies upon them to prove that the debt was contracted for an immoral or illegal purpose (*x*). It is not necessary for the purchaser to show that there was a proper inquiry as to the purpose of the loan, or to prove that the money was borrowed in a case of necessity (*y*).

The burden which lies upon the sons to prove the immorality of the debt is not discharged by showing that the father lived an extravagant and immoral life ; there must be a distinct connection between the debt and the immorality set up by the sons (*z*).

(5) *Construction of execution proceedings.*—It is stated above that where the father has contracted a debt *for his own personal benefit*, the creditor may obtain a decree *against the father alone*, and may enforce the decree by attachment and sale of the entire joint family property including the sons' interest therein. But though the creditor *can* in execution of his decree sell the entire joint family property, he is not obliged to do so. He may put up only the father's interest for sale. If what is bought and sold is the father's interest alone, the purchaser is not, except in some cases in Bombay, entitled to possession of *any part* of the property, and his only remedy is to bring a general suit for partition and for possession of the share which would be allotted to the father on such partition [s. 261 (*1*)]. But if what is bought and sold is the entire property, the purchaser is entitled to possession of the whole. It is, therefore, important in each case to inquire whether the sale passed the whole property including the son's interest therein, or only the father's interest in the property. The determination of this question depends mainly on the terms of the execution and sale proceedings, such as the application for execution, warrant of attachment, warrant of sale and sale certificate. The Court will in each case look at the

(*x*) *Bhagbut Pershad* v. *Girja Koer* (1888) 15 Cal. 717, 724, 15 I.A. 99, 104; *Muddun Thakoor* v. *Kantoo Lall* (1874) 14 Beng L. R. 187, 1 I. A. 321; (1878) 5 Cal 148, 6 I.A. 88, *supra*; (1885) 13 Cal 21, 13 I.A. 1, *supra*; (1891) 13 All 216, *supra*; (1892) 14 All. 179 [F.B.], *supra*; *Brij Narain* v. *Mangla Prasad* (1924) 46 All. 95, 51 I.A. 129, 76 I.C. 689, ('24) A.PC. 50.

(*y*) (1888) 15 Cal. 717, 724, 15 I.A. 99, 104, *supra*.

(*z*) *Bhagbut Pershad* v. *Girja Koer* (1888) 15 Cal. 717, 15 I.A. 99; *Ram Rattan* v. *Basant Rai* (1921) 2 Lah. 263, 64 I. C. 121, ('21) A.L. 205; *Johan Singh* v. *Hardat Singh* (1935) 57 All. 357, 152 I. C. 487, ('35) A.A. 247.

substance of the proceedings to see what the purchaser intended to buy and what he believed he was buying (*a*). "In cases of this kind it is of the utmost importance that the substance, and not the mere technicalities, of the transaction should be regarded" (*b*). The price paid by the purchaser is also an element to be taken into consideration (*c*). **S. 294B (5)**

The following are some of the principles culled from decided cases :—

(i) "If the expressions by which the estate is conveyed to the purchaser [in execution] are susceptible of application either to the entirety or to the father's coparcenary interest alone, the absence of the sons from the proceedings may be one material consideration. But if the fact be that the purchaser has bargained and paid for the entirety, he may clearly defend his title to it upon any ground which would have justified a sale if the sons had been brought in to oppose the execution proceedings" (*d*).

(ii) The words "right, title and interest" are ambiguous. They may refer to the father's interest only in the property or to the entire property. If it appears from the terms of the execution proceedings and from the intention of the parties that what was put up for sale and what was bought was the entire property, but the property is described in the certificate of sale as "the right, title and interest of the judgment-debtor," the sale will nevertheless pass the entire property. The presence of the words "right, title and interest" in a sale certificate is consistent with the sale of every interest which the judgment-debtor might have sold, and does not necessarily import that when the father of a joint family is the judgment-debtor nothing is sold but his interest as a coparcener (*e*). But if it is clear from the terms of the execution proceedings that what was put up for sale was the "right and share" of the judgment-debtor alone in the property, the sale will pass only the father's interest. The purchaser cannot claim the entire property merely because the decree-holder could have brought the whole property to sale, had he been so minded (*f*).

(*a*) *Deendyal* v. *Jugdeep Narain* (1877) 3 Cal. 198, 4 I.A. 247; *Baboo Hurdey Narain* v. *Rooder Perkash* (1883) 10 Cal. 626, 11 I.A. 26; *Mst. Nanomi Babuasin* v. *Modun Mohun* (1885) 13 Cal. 21, 13 I.A. 1; *Daulat Ram* v. *Meher Chand* (1887) 15 Cal. 70, 14 A. A. 187; *Rai Babu Mahabir Pershad* v. *Markunda Nath* (1889) 17 Cal. 584, 17 I.A. 11; *Prettachi Chettiar* v. *Sangili Veera Pandia* (1887) 10 Mad. 241, 248, 14 I.A. 84, 85; *Simbuhnath* v. *Golab Singh* (1887) 14 Cal. 572, 14 I.A. 77; (1888) 15 Cal. 717, 15 I.A. 99, *supra*; *Minakshi* v. *Immudi* (1888) 12 Mad. 112, 16 I.A. 1; *Abdul Aziz* v. *Appayasami* (1903) 27 Mad. 131, 31 I.A. 1; *Sripat Singh* v. *Tagore* (1917) 44 I.A. 1, 44 Cal. 524, 39 I.C. 252, ('16) A.PC. 220; *Trimbak* v. *Narayan Damodar* (1884) 8 Bom. 481; *Sakharam Shet* v. *Sitaram* (1887) 11 Bom. 42; *Krishnaji* v. *Vithal* (1888) 12 Bom. 625; *Maruti* v. *Babaji* (1891) 15 Bom. 87; *Cooverji* v. *Dewsey* (1893) 17 Bom. 718; *Timmappa* v. *Narsinha* (1913) 37 Bom. 331, 21 I.C. 123; *Hanmandas* v. *Valabhdas* (1919) 43 Bom. 17, 46 I.C. 133, ('18) A. B. 101; *Dayanand* v. *Daji Narain* (1926) 50 Bom. 793. 98 I.C. 754, ('26) A.B. 548; *Kunhali* v. *Keshava* (1888) 11 Mad. 64; *Ramphul Singh* v. *Dey Narain* (1882) 8 Cal. 517, 527; *Beni Parshad* v. *Puran Chand* (1896) 23 Cal. 262; *Pem Singh* v. *Partab* (1892) 14 All. 179 [F.B.].

(*b*) *Sripat Singh* v. *Tagore* (1916) 44 I.A. 1, 44 Cal. 524, 39 I.C. 252, ('16) A.PC. 220; *Rai Babu Mahabir Pershad* v. *Markunda Nath* (1889) 17 Cal. 584, 17 I.A. 11; *Cooverji* v. *Dewsey* (1893) 17 Bom. 718; *Dayanand* v. *Daji Narayan* (1926) 50 Bom. 793, 98 I.C. 754, ('26) A.B. 548.

(*c*) *Simbhunath* v. *Golab Singh* (1887) 14 Cal. 572, 14 I.A. 77; *Beni Parshad* v. *Puran Chand* (1896) 23 Cal. 262, 278; (1926) 50 Bom. 793, 799, 98 I.C. 754, ('26) A.B. 548, *supra*.

(*d*) *Mst. Nanomi Babuasin* v. *Modun Mohun* (1885) 13 Cal. 21, 36, 13 I.A. 1, 18. In *Deendyal* v. *Jugdeep Narain* (1877) 3 Cal. 198, 4 I.A. 247, also there was an ambiguity.

(*e*) (1889) 17 Cal. 584, 17 I.A. 11, *supra*, *Bhabut Pershad* v. *Girja Koer* (1888) 15 Cal. 717, 721, 15 I.A. 99, (1885) 13 Cal 21, 13 I.A. 1, *supra*; *Sakharam Shet* v. *Sitaram* (1887) 11 Bom. 42.

(*f*) (1877) 3 Cal. 198, 4 I.A. 247, *supra*; *Baboo Hurdey Narain* v. *Rooder Perkash* (1883) 10 Cal. 626, 11 I.A. 26; *Pettachi Chettiar* v. *Sangili Veera* (1887) 10 Mad. 241, 14 I.A. 84; *Abdul Aziz* v. *Appayasami* (1903) 27 Mad. 131, 31 I.A. 1; *Krishnaji* v. *Vithal* (1888) 12 Bom. 625; *Maruti* v. *Babaji* (1891) 15 Bom. 87; *Timmappa* v. *Narsinha* (1913) 37 Bom. 631, 21 I.C. 123; *Hanmandas* v. *Valabhdas* (1919) 43 Bom. 17, 46 I.C. 133, ('18) A.B. 101. As to High Court Circulars, see (1926) 50 Bom. 793, 98 I.C. 754, ('26) A.B. 548, *supra*.

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(iii) The mere fact that no reference is made in the proclamation of sale to the son's interest does not of itself afford a ground for holding that the son's interest did not pass at the sale (*g*).

(iv) If the creditor sues the father alone, and a consent decree is obtained against the father, whereby the father agrees to pay a specified sum within a specified period and by way of security mortgages his "right, title and interest" in certain joint family property, and agrees that in the event of non-payment the mortgaged property shall be sold by auction, and the property is afterwards sold, and a certificate of sale is issued to the purchaser stating that "whatever right, title and interest the judgment-debtor had in the said property, being extinguished from the date of the sale, is transferred to the purchaser," the purchaser is entitled to no more than the father's interest in the property. "When a man conveys his right and interest, and nothing more, he does not *prima facie* intend to convey away also rights and interest presently vested in others, even though the law may give him the power to do so." In such a case, if it is alleged by the purchaser that the sons assented to the decree and the mortgage, he should join them as parties to the execution proceedings (*h*).

(v) Where a mortgage is executed by the father of joint family property, the Court must take it that the entire property was mortgaged, unless the sons show that what was mortgaged was the father's interest only (*i*), or unless the mortgage itself purports to be one of the father's interest only (*j*). Where the mortgage is of the entire property, and a decree is passed for sale of the property, the sale will pass the whole property to the purchaser, notwithstanding the words "right, title and interest of the judgment-debtor" in the certificate of sale (*k*).

294C. Execution of decree against father after his death.—Where a decree has been passed against the father in respect of a debt incurred by him, and the father dies before the decree has been fully satisfied, the decree may be executed under sec. 53 of the Civil Procedure Code, 1908, by attachment and sale of the ancestral property in the hands of the sons, as if such property were the property of the deceased father which had come to the hands of the sons as his legal representatives, unless the debt was incurred for an illegal or immoral purpose. If the sons contend that the debt was incurred for an immoral purpose, the question has to be determined in execution proceedings, and not in a separate suit (*l*). If the contention of the sons is that there is really no debt the question cannot be enquired into in execution proceedings, but only in a regular suit (*m*).

(*g*) (1926) 50 Bom. 793, 98 I.C. 754, ('26) A.B. 548, *supra*.

(*h*) *Simbhunath* v. *Golab Singh* (1887) 14 Cal. 572, 14 I.A. 77, 83.

(*i*) *Pem Singh* v. *Partab Singh* (1892) 14 All. 179 [F.B.]; *Bhagbut Pershad* v. *Girja Koer* (1888) 15 Cal. 717, 721, 15 I.A. 99.

(*j*) See *Simbhunath* v. *Golab Singh*, *supra*.

(*k*) *Trimback* v. *Narayan* (1884) 8 Bom. 481.

(*l*) Code of Civil Procedure 1908, s. 53. *Umed* v. *Goman Bhaiji* (1896) 20 Bom. 385; *Shivram* v. *Sakharam* (1909) 33 Bom. 39, 1 I.C. 459; *Amar Chandra* v. *Sebak Chanda* (1907) 34 Cal. 642 [F.B.]; *Sheikh Karoo* v. *Rameshwar Sao* (1921) 6 Pat. L. J. 451, 460-462, 62 I. C. 905, ('23) A. P. 143 [mortgage-decree against father]; *Narayan* v. *Saqunabai* (1925) 49 Bom. 113, 85 I.C. 181, ('25) A.B. 193.

(*m*) *Lakshmadu* v. *Ramudu & Ors.* (1940) Mad. 123, ('39) A.M. 867, 187 I.C. 816.

This sub-section is based on ss. 50 and 53 of the Civil Procedure Code, 1908. See Mulla's Civil Procedure Code, notes to s. 53. No attachment is necessary where a *final* mortgage decree for the sale of the property has been passed against the father in his lifetime; the property in that case is sold under and by virtue of the decree, without any previous attachment (*n*).

S. 53 applies in the case of the sons of a judgment debtor only and not in the case of his brother (*o*).

Sec. 53 does not apply to a case where the suit on a mortgage by the father was filed against the sons and grandsons, but was dismissed against the latter. The share of the grandsons cannot be attached and sold as it was not covered by the decree (*p*); but this principle cannot be availed of by after born sons and grandsons (*q*).

Nor does s. 53 apply to a case where the suit against the father is filed after partition (*r*).

If the father dies leaving *sons and also his own father*, and subsequently the father's father dies, it has been held in Allahabad that the decree cannot be executed against the ancestral property in the hands of his sons (*s*). But this decision has been dissented from by the Punjab High Court (*t*). It is submitted that the former case was incorrectly decided.

295. Sale or mortgage of coparcenary property by father for payment of antecedent debt.—(*1*) *Antecedent debt*—The father of a joint Hindu family may sell or mortgage the joint family property including the sons' interest therein to discharge a debt contracted by him *for his own personal benefit*, and such alienation binds the sons, provided—

(a) the debt was antecedent to the alienation, and

(b) it was not incurred for an immoral purpose (*u*).

The validity of an alienation made to discharge an antecedent debt rests upon the pious duty of the son to discharge his father's debt not tainted with immorality. The mere circumstance, however, of a pious obligation does not validate the *alienation*. To validate an alienation so as to bind the son, there must also be an antecedent debt (*v*). Generally, there is no question of legal necessity in such a case (*w*). But where the antecedent debts carried no compound interest and yet the mortgage effected by the father to discharge them

(*n*) *Sheik Karoo* v. *Rameshwar Sao* (1921) 6 Pat. L.J. 451, 62 I.C. 905, ('23) A.P. 143.

(*o*) *Sheo Gopal* v. *Firm Ganesh Das Ram Gopal* (1938) Luck. 241, 168 I.C. 268, ('37) A.O. 327.

(*p*) *Raja Ram* v. *Raja Baksh Singh* (1938) 13 Luck. 61, 40 Bom. L.R. 277, 172 I.C. 5, ('38) A.PC. 7.

(*q*) *Raja Baksh Singh* v. *Ram Swarup* (1944) Luck. 481.

(*r*) *Atul Krishna Roy* v. *Lala Nandanji* (1935) 14 Pat. 732 [F.B.], 157 I.C. 53, ('35) A.P. 275.

(*s*) *Binda Prasad* v. *Raj Ballabh* (1926) 48 All. 245, 91 I.C. 785, ('26) A.A. 220.

(*t*) *Devi Das* v. *Jada Ram* (1934) 15 Lah. 50, 147 I.C. 225, ('33) A.L. 857.

(*u*) *Sat Narain* v. *Sri Kishen Das* (1936) 63 I.A. 384, 17 Lah. 644, 38 Bom. L. R. 1129, 164 I. C. 6, ('36) A.PC. 277.

(*v*) *Brij Narain Rai* v. *Mangla Prasad* (1924) 51 I.A. 129, 46 All. 95, 77 I.C. 689, ('24) A.PC. 50; *Narain Prasad* v. *Sarnam Singh* (1917) 44 I.A. 163, 39 All. 500, 40 I.C. 284, ('17) A.PC. 41; *Jogi Das* v. *Ganga Ram* (1917) 21 C.W.N. 957, 42 I.C. 791, ('17) A.PC. 76; *Chet Ram* v. *Ram Singh* (1922) 49 I.A. 228, 44 All. 368, 67 I.C. 569, ('22) A.PC. 247, affmg. (1919) 41 All. 529, 51 I.C. 119, ('19) A.A. 415.

(*w*) *Rama Rao* v. *Hanumantha* (1929) 52 Mad. 856, 121 I.C. 837, ('30) A.M. 326.

S. 295 (1) provided for compound interest at a high rate with quarterly rests, to that extent, the onus is on the creditor to show that the loan could be obtained only on such terms and if no evidence is adduced the lender has not discharged the burden (*x*).

"Antecedent debt" means antecedent in fact as well as in time, that is to say, that the debt must be *truly independent of and not part of the transaction impeached* (*y*). A borrowing made *on the occasion of* the grant of a mortgage is not an antecedent debt (*z*) [see ills. (1) to (4)].

To constitute a debt an "antecedent" debt it is not necessary that the prior and subsequent creditors should be *different* persons. All that is necessary is that the two transactions must be dissociated in time as well as in fact (*a*). Hence where a previous mortgage deed is renewed in favour of the *same* mortgagee, and the consideration for the subsequent mortgage deed is the amount due on the earlier one, the alienation would be one for an "antecedent" debt (*b*), unless the first debt was a mere device and was incurred merely for the sake of creating an antecedence in time and with a view to support the subsequent deed (*c*). Where a mortgage was executed by the members of a joint family in favour of a stranger, who was a partner in a business with the family, in settlement of accounts of the firm, it was held that the debt being antecedent to the mortgage, the mortgage was binding on the son's share also (*d*). Where a father received certain sums of money on behalf of his minor widowed daughter under a compromise decree and executed an indemnity bond undertaking to indemnify the defendants against all losses resulting from the minor plaintiff raising disputes after attaining majority, charging some immoveable property belonging to the joint

(*x*) *Bal Rajaram Tukaram* v. *Maneklal Mansukhlal* (1932) 56 Bom. 36, 137 I.C. 717, ('32) A.B. 136.

(*y*) (1923) 51 I.A. 129, 46 All. 95, 77 I.C. 689, ('24) A.PC. 50, *supra*.

(*z*) *Chandradeo* v. *Mata Prasad* (1909) 31 All. 176, 190, 1 I.C. 479 [F.B.]; *Chaturbhuj* v. *Govind Ram* (1923) 45 All. 407, 74 I.C. 71, ('23) A.A. 218, dissenting from *Nathu* v. *Kundan Lal* (1911) 33 All. 242, 8 I. C. 836 [mortgage to pay off pre-emption decree]; *Shaik Jan* v. *Bikoo* (1928) 7 Pat. 798, 116 I.C. 33, ('29) A.P. 130; *Buta Mal* v. *Gopal Singh* (1930) 11 Lah. 164, 122 I.C. 480, ('30.) A.L. 1040.

(*a*) *Ramkaran Thakur* v. *Baldeo Thakur* (1938) 17 Pat. 168, 173 I. C. 292, ('38) A.P. 44; *Bharatpur State* v. *Sri Kishen Das* (1936) 58 All. 804 [F.B.], 162 I.C. 642, ('36) A.A. 327.

(*b*) *Gopal Das* v. *Topan Das* (1935) 16 Lah. 624.

(*c*) *Ram Rekha Singh* v. *Ganga Prasad* (1927) 49 All. 123, 97 I.C. 514, ('26) A.A. 545 [F.B.]; *Badri Prasad* v. *Madan Lal* (1893) 15 All. 75, 80 [F.B.]; *Jai Narain* v. *Mahabir Prasad* (1927) 2 Luck. 226, 95 I.C. 857, ('26) A.O. 470; *Sheo Ram* v. *Durga* (1928) 3 Luck. 700, 108 I.C. 288, ('28) A.O. 378 [F.B.]; *Iqbal Singh* v. *Jasmer Singh* (1934) 15 Lah. 715, 153 I.C. 862, ('34) A.L. 296.

(*d*) *Nachimuthu Goundun* v. *Balasubramania Goundan* (1939) Mad. 422.

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family, it was held that the sons' share was not liable as there was no antecedence of debt (*e*).

The antecedent debt may be an unascertained sum of money. It may be a debt incurred in connection with a trade started by the father (*f*).

(*2*) *Burden of proving immorality of debt.*—It is for the alienee to prove that the antecedent debt existed or that after due inquiries he, in good faith, believed that it existed (*g*). The burden is then shifted upon the sons to prove that the debt was contracted by the father for an immoral or illegal purpose (*h*) and that the alienee had notice that the debt was so contracted (*i*). It is not necessary for the alienee to show that he made proper inquiry as to the purpose of the loan, or to prove that the money was borrowed for the benefit of the family (*j*).

The burden which lies upon the sons to prove the immorality of the debt is not discharged by showing that the father lived an extravagant or immoral life; there must be a direct connection between the debt and the immorality set up by the sons (*k*).

(*3*) *Alienation binds sons' interest.*—If the debt is antecedent to the alienation, the alienation is valid in its entirety, and it will pass not only the father's but also the sons' interest in the property. Thus if the alienation is a *sale* of joint family property, the whole property will pass to the purchaser.

(*e*) *Allavenkataramanna* v. *Palacherla Mangamma & Ors.* (1944) Mad. 867.

(*f*) *Bal Rajaram Tukaram* v. *Maneklal Mansukhlal* (1932) 56 Bom. 36, 137 I.C. 117, ('32) A.B. 136.

(*g*) *Jamsetji* v. *Kashinath* (1902) 26 Bom. 326, 336-337; *Jamna* v. *Nain Sukh* (1887) 9 All. 493; *Chandradeo* v. *Mata Prasad* (1909) 31 All. 176, 198-199, 1 I.C. 479; *Sahib Singh* v. *Girdhari Lal* (1923) 45 All. 576, 73 I.C. 1024, ('24) A.A. 24; *Subramanya* v. *Sadasiva* (1885) 8 Mad. 75. See Transfer of Property Act, 1887, s. 28.

(*h*) *Girdharee Lall* v. *Kantoo Lall* (1874) 14 Beng. L. R. 187, 1 I.A. 321; *Suraj Bunsi Koer* v. *Sheo Proshad* (1878) 5 Cal. 148, 6 I.A. 88; *Balwant Singh* v. *Clancey* (1912) 39 I.A. 109, 34 All. 296, 14 I.C. 629, affmg. 28 All. 508; *Joharmal* v. *Eknath* (1900) 24 Bom. 343; *Natasayyan* v. *Ponnusami* (1893) 16 Mad. 99; *Raj Kishore* v. *Madan Gopal* (1932) 13 Lah. 491, 143 I.C. 249, ('32) A.L. 636.

(*i*) *Suraj Bunsi Koer* v. *Sheo Proshad* 6 I.A. 88, 106, 5 Cal. 148, 171; *Darsu Pandey* v. *Bikarmajit Lal* 3. All. 125. (The first part of the decision that the recital in the sale deed is enough to prove the antecedent debt and other necessities is not correct; but the second part relating to immorality and notice is correct.); *Hanuman Singh* v. *Nanak Chand* 6 All. 193, 199; *Lal Singh* v. *Deo Narain Singh* 8 All. 279, 282.

(*j*) *Bhagbut Pershad* v. *Girja Koer* (1888) 15 Cal. 717, 724, 15 I.A. 99, 104; *Babu Singh* v. *Bihari Lal* (1908) 30 All. 156; *Tulsi Ram* v. *Bishnath Prasad* (1928) 50 All. 1, 105 I.C. 885, ('27) A.A. 735.

(*k*) *Sri Narain* v. *Lala Raghubans* (1912) 17 C.W.N. 124, 17 I.C. 729 [P.C.]; *Chintamanrao* v. *Kashinath* (1890) 14 Bom. 320; *Dattatraya* v. *Vishnu* (1912) 36 Bom. 68, 12 I.C. 949; *Sita Ram* v. *Zalim Singh* (1886) 8 All. 231; *Babu Singh* v. *Beharilal* (1908) 30 All. 156; *Tulsi Ram* v. *Bishnath Prasad* (1928) 50 All. 1, 105 I.C. 885, ('27) A.A. 735; *Rallia Ram* v. *Balmokand* (1927) 8 Lah. 117, 101 I.C. 830, ('27) A.L. 60; *Ulfat Rai* v. *Tej Narain* (1927) 8 Lah. 632, 106 I.C. 176, ('28) A.L. 83; *Raj Kishore* v. *Madan Gopal* (1932) 13 Lah. 491, 143 I.C. 249, ('32) A. L. 636.

S. 295 (3)-(8) Again if the alienation is a *mortgage*, the mortgagee may obtain a *mortgage decree* against the father alone for the sale of the whole of the mortgaged property including the sons' interest therein, and the sale in execution of the decree will bind the interest both of the father and the sons in the property.

(*4*) *Alienation after partition.*—The father has no power to alienate his son's share after a partition between him and the son, although the alienation may be in respect of a debt which was contracted before partition (*l*).

(*5*) *Alienation after attachment of son's share.*—The father has no power to alienate his son's share after it has been attached in execution of a decree. The decree may be one against the son in respect of a personal debt of the *son*, or it may be one against the father, or both against the father and the son, in respect of a personal debt of the *father* (*m*).

(*6*) Whether a sale or mortgage executed by the father passes the whole family property or only the father's interest therein depends on the terms of the deed (*n*).

(*7*) If the alienation be one for legal necessity, it is not necessary, to bind the sons' interest, to have recourse to the doctrine of antecedent debt (*o*).

(*8*) The expression "sons" in this section includes grandsons and great-grandsons. The expression "father" includes grandfather and great-grandfather. See s. 291.

Illustrations.

(1) The father of a joint family borrows Rs. 2,000 from *C* for his own use. Subsequently he executes a mortgage of the joint family property to *C* to secure the debt. It is not proved that the money borrowed was used by the father for immoral purposes. The mortgage binds not only the father's, but also his sons' interest in the property. Here the debt is *antecedent* to the *mortgage* in fact as well as in time (*p*).

(2) The father of a joint family governed by the Mitakshara law as applied in the United Provinces, mortgages the joint family property in 1883 to secure an advance made to him *at the time of the execution of the mortgage.* In 1910 the mortgagee sues the father and his son for a sale of the mortgaged property. It is proved that the money was borrowed by the father for *his own personal benefit,* and not for any family necessity. Here the loan having been made at the time of the mortgage, there is no debt *antecedent* to the *mortgage.* The mortgage is therefore wholly invalid. It does not bind even the father's

(*l*) *Rathna* v. *Aiyanchariar* (1908) 18 Mad. L.J. 599; *Krishnasami* v. *Ramasami* (1899) 22 Mad. 519, 521.

(*m*) *Subraya* v. *Nagappa* (1909) 33 Bom. 264, 2 I.C. 268.

(*n*) *Pem Singh* v. *Partab Singh* (1892) 14 All. 179 [F.B.]; *Simbhunath* v. *Golab Singh* (1887) 14 Cal. 572, 14 I.A. 77; *Pettachi Chettiar* v. *Sangili Veera* (1887) 10 Mad. 241, 14 I.A. 84; *Bhagbat Pershad* v. *Girja Koer* (1888) 15 Cal. 717, 15 I.A. 99.

(*o*) *Lal Bahadur* v. *Ambika Prasad* (1925) 52 I.A. 443, 47 All. 995, 91 I.C. 471, ('25) A.PC. 264.

(*p*) *Madhusudan* v. *Bhagwan* (1929) 53 Bom. 444, 118 I.C. 788, ('29) A.B. 213.

share in the property. Nor is the mortgagee entitled even to a personal decree against the father or the sons, the claim for such decree being barred by limitation: *Sahu Ram* v. *Bhup Singh* (1917) 44 I.A. 126, 39 All. 437, 39 I.C. 280, ('17) A.PC. 61. **S. 295 (8)**

(3) *S* and his sons are members of a joint Hindu family governed by the Mitakshara aw as interpreted in the United Provinces. In 1905 *S* mortgages the joint family property to *A*. In 1907 *S* executes a second mortgage of the same property to *B*. In 1908 *S* executes a mortgage of the property to *C* to pay off the earlier mortgages to *A* and *B*. *C* then sues *S* and his sons on the mortgage of 1908. It is not proved that the mortgages to *A* and *B* were executed by *C* for family necessity. Here the mortgage to *C* having been made to pay off the *antecedent* debts due to *A* and *B*, it binds the whole property including the sons' interest therein, and *C* is entitled to a decree for sale of the whole property *Brij Narain Rai* v. *Mangla Prasad* (1923) 51 I.A. 129, 46 All. 95, 77 I.C. 689, ('24) A.PC. 50; *Anantu* v. *Ram Prasad* (1924) 46 All. 295, 78 I.C. 619, ('24) A.A. 465; *Bhim Singh* v. *Ram Singh* (1924) 46 All. 301, 84 I.C. 13, ('24) A.A. 309; *Gauri Shanker* v. *Sheonandan* (1924) 46 All. 384, 78 I.C. 911, ('24) A.A. 543; *Kanhaiya Lal* v. *Niranjan Lal* (1925) 47 All. 351, 86 I.C. 98, ('25) A.A. 367; *Kuldip* v. *Ram Bujhawan* (1924) 3 Pat. 425, 83 I.C. 385, ('24) A.P. 454. [Note.—It is unnecessary in such a case to inquire whether the mortgages to *A* and *B* were executed to pay off a debt antecedent to either of the two mortgages. The *transaction impeached* is the mortgage to *C* and *that* mortgage was executed to pay off the *antecedent debts secured by the mortgages to A and B.*]

(4) The father of a joint family governed by the Mitakshara law executed a usufructuary mortgage of the joint family property to secure an advance *then* made to him for his own personal benefit. He then sold the equity of redemption to the mortgagee, the mortgage being discharged out of the price and the balance paid to him. After the father's death, but during the life-time of his sons, his grandsons sued the purchaser to recover the property from him. It was held by the Judicial Committee that there being no debt *antecedent* to the *first alienation*, namely the mortgage, the mortgage and the sale were both invalid: *Chet Ram* v. *Ram Singh* (1922) 49 I.A. 228, 44 All. 368, 67 I.C. 569, ('22) A.PC. 247. This decision is clearly in conflict with the later decision in *Brij Narain*'s case set forth in ill. (3) above, and it can no longer be regarded as good law. The test now laid down in *Brij Narain*'s case [see ill. (3) above] is whether the *transaction impeached*, namely, the sale of the equity of redemption, was entered into to pay off an antecedent debt. There is no doubt that it was, the antecedent debt being the debt secured by the *mortgage*. If the case arose again, the sale would be treated as valid, as it was made to pay off an *antecedent* mortgage. Whether the mortgage itself was executed to pay off an antecedent debt is not material (*q*).

(5) The father of a joint family governed by the Mitakshara law as administered in the United Provinces executed a deed of mortgage in 1900 of joint family property. In 1906 he sold the property for Rs. 13,000 of which Rs. 1,400 was paid to the mortgagee, the rest of the mortgage debt having been discharged long prior to 1906. The balance of the purchase money was applied by the father to his own purposes. It was held by the Judicial Committee that the sale could not be supported as having been made to discharge an antecedent debt, and they upheld the decree of the Allahabad High Court setting aside the sale, upon the sons, who were the plaintiffs in the suit, paying Rs. 1,400 to the purchaser: *Jawahir Singh* v. *Udai Prakash* (1926) 53 I.A. 36, 48 All. 152, 93 I.C. 216, ('26) A.PC. 16.

1. Brij Narain Rai v. Mangla Prasad (1924) 51 I.A. 129, 46 All. 95, 77 I.C. 689, ('24) A.PC. 50.—The leading case on the subject is *Brij Narain*'s case. In that case the Judicial Committee, after observing that *Sahu Ram*'s case (*r*) must not be taken

(*q*) It is now so held in *Anantu* v. *Ram Prasad* (1924) 46 All. 295, 296-297, 78 I.C. 619, ('24) A.A. 465.

(*r*) (1917) 44 I.A. 126, 39 All. 437, 39 I.C. 280.

S. 295 (8) to decide more than what was necessary for the judgment, namely, that a debt created by the mortgage itself is not an antecedent debt, expressed their dissent from several *dicta* in that case, and laid down the following propositions :—

(1) The managing member of a joint undivided estate cannot alienate or burden the estate *qua* manager except for purposes of necessity [see s. 242].

(2) If he is the father and the other members are the sons he may, by incurring debt. so long as it is not for an immoral purpose, lay the estate open to be taken in execution proceedings upon a decree for payment of that debt [see s. 294].

(3) If he purports to burden the estate by mortgage, then unless that mortgage is to discharge an antecedent debt, it would not bind the estate [see s. 295].

(4) Antecedent debt means antecedent in fact as well as in time, that is to say, that the debt must be truly independent of, and not part of, the transaction impeached [see s. 295].

(5) There is no rule that this result is affected by the question whether the father who contracted the debt or burdened the estate, is alive or dead.

2. **Antecedent.**—In *Sahu Ram*'s case (*s*), their Lordships of the Privy Council speak of the doctrine of antecedent debt as having " arisen from the necessity of protecting the rights of third persons." In *Brij Narain*'s case the doctrine is described as a part of the doctrine of pious obligation. The latter view must be taken to supersede, the former view.

There was at one time a conflict of opinion as to the meaning of " antecedent debt." According to the Allahabad and Madras decisions, an antecedent debt meant a debt which existed *prior* to the date of sale or mortgage; money received *at the time of sale or mortgage* was not regarded as an antecedent debt (*t*). According to the Calcutta and Bombay rulings, a debt, though not existing to *prior* the date of *sale or mortgage*, was treated as an antecedent debt, if it was put into litigation in a subsequent *suit* ; that is to say, if the father borrowed moneys on a mortgage of joint family property, and the sons subsequently sued to set aside the mortgage, the mortgage was upheld on the ground that the debt secured by it was antecedent to the suit (*u*). This was too fantastic a view to be taken of an antecedent debt. The earlier cases were reviewed by the Privy Council in *Brij Narain Rai* v. *Mangla Prasad* [see ill. (3)]. The test there laid down whether the *transaction impeached* was entered into to pay off an antecedent debt, that is, a debt antecedent to the transaction [see the 4th proposition in note 1 above].

If the father of a joint Hindu family borrows money in 1918 on a *promissory note* for his own personal benefit, and, being unable to pay the debt, *mortgages* the joint family property in 1920, it is clearly a case of a debt *antecedent* to the *mortgage* and the mortgage binds his sons. But if no debt was contracted by the father antecedent to the mortgage, and a loan was obtained by him for the first time *at the time* when the mortgage was executed by him, the loan could not be regarded as an antecedent debt.

Suppose now that the father executes a mortgage to *A* of joint family property to secure an advance of Rs. 1,500 *then* made to him. [Here the mortgage is invalid, there being no antecedent debt.] He then borrows Rs. 2,000 from *B* and executes a mortgage to *B* to pay off the mortgage to *A*. Is the mortgage to *B* binding on the sons ? Prior to the decision in *Brij Narain Rai*'s case there was a conflict of opinion whether the mortgage to *B* could be treated as one for payment of an *antecedent* debt. It was held by

(*s*) *Ibid.*

(*t*) *Chandradeo* v. *Mata Prasad* (1909) 31 All. 176, 190, 1 I.C. 479 [mortgage] [F.B.]; *Ram Dayal* v. *Ajudhia Prasad* (1906) 28 All. 328 [sale]; *Venkataramanaya* v. *Venkataramana* (1906) 29 Mad. 200 [mortgage] [F.B.].

(*u*) *Lachman Das* v. *Giridhur* (1880) 5 Cal. 855 [F.B.]; *Khalilul* v. *Gobind* (1893) 20 Cal. 328, 346; *Kishun* v. *Tipan Pershad* (1907) 34 Cal. 735, 747; *Chintamanrav* v. *Kashinath* (1890) 14 Bom. 320, 324-325; *Dattatraya* v. *Vishnu* (1912) 36 Bom. 68, 12 I.C. 949.

the High Courts of Allahabad (*v*) and Lahore (*w*), that the mortgage to *A* not having been made to pay off an antecedent debt, the subsequent mortgage to *B* also which was made to pay off the mortgage to *A* could not be treated as one for payment of an antecedent debt; in other words, it was held that for a debt to be an antecedent debt, it must be antecedent to the *first* alienation, namely, the mortgage to *A*, and not merely antecedent to the *alienation impeached*, namely, the mortgage to *B*. On the other hand it was held by the High Courts of Madras (*x*) and Patna (*y*), that the mortgage to *B* was binding on the sons as it was made to pay off an antecedent debt, being the debt secured by the mortgage to *A*. In *Brij Narain Rai*'s case the Privy Council held that the view taken by the Madras High Court was correct. **S. 295 (8)**

The antecedence must be *real*. The antecedence would be unreal if the father borrowed money on a promissory note with the object *when he borrowed* that it should form part on a mortgage to be subsequently executed by him (*z*). Where no mortgage was intended at the time of advance of the loan but there was an agreement to execute a mortgage if and when called upon and a mortgage was subsequently executed, it was held that the mortgage was supported by antecedent debt (*a*).

In a suit on a mortgage bond dated 16-1-1922 for Rs. 3,000 executed by *B* and his 3 nephews for the purpose of paying off

(1) Rs. 750 the balance of consideration due under a sale deed dated 30-7-1919 obtained by *B* and his nephew *P* (brother of the 3 nephews above mentioned)

(2) Rs. 1,500 balance of consideration dated 19-11-1921 in favour of the aforesaid 3 nephews of *B* and a minor son of *P* and a son of *B*, the suit was contested by the sons of the 3 nephews (defendants 3 to 7) and a grandson of *B* (defendant 8) (*B* having died) on the ground that there was no legal necessity. It was held

(1) that there was no real antecedency between the suit mortgage bond and the sale-deed of 1921 but that the balance due under the sale-deed of 1919 was an antecedent debt,

(2) even as to the latter item the mortgage was not valid against the (defendants 3 to 7) as their fathers executed it not for their own antecedent debt but for that of their uncle *B* and brother *P*,

(3) that the grandson of *B* (defendant 8) was not liable as the proportion for which *B* is liable on the suit mortgage bond could not be determined (*b*).

There must be a real debt due by the father. Therefore, where the only prior debt was due by a third party and the father executed as surety a hypothecation bond in favour of the creditor, it was held not to be binding on the sons' shares (*c*).

Where a father at the time of taking a mortgage agrees to pay off a prior mortgage the obligation so undertaken is an 'antecedent debt' which will support a mortgage of joint family property subsequently executed by the father in favour of the prior mortgagee in fulfilment of the obligation (*d*).

It has been held that where the father mortgages joint family property to pay off a prior mortgage on his *separate* property it cannot be said that the mortgage was one

(*v*) *Brijnarain* v. *Mangal* (1919) 41 All. 235, 35 I.C. 101, ('19) A.A. 324; *Ram Sarup* v. *Bharat Singh* (1921) 43 All. 703, 64 I.C. 763, ('21) A.A. 113.

(*w*) *Lakhu Mal* v. *Bishen Das* (1922) 3 Lah. 74, 66 I.C. 408, ('22) A.L. 291.

(*x*) *Armugham* v. *Muthu* (1919) 42 Mad. 711, 52 I.C. 525, ('19) A.M. 75 [F.B.].

(*y*) *Mathura* v. *Rajkumar* (1921) 6 Pat. L.J. 526, 62 I.C. 132, ('21) A.P. 447 [F.B.]; *Hari Prasad* v. *Sourendra* (1922) 1 Pat. 506, 66 I.C. 945, ('22) A.P. 450.

(*z*) (1921) 43 All. 703, 64 I.C. 763, ('21) A.A. 113, *supra*.

(*a*) *Venkatramaswami* v. *Imperial Bank of India* (1939) Mad. [F.B.] 7.

(*b*) *Mahabir* v. *Sukh Ram* (1942) All. 498, 201, I.C. 415, ('42) A.A. 361.

(*c*) *Ganga Saran* v. *Ganeshi Lal* (1939) Bom. 451.

(*d*) *Chatar Sen* v. *Rajaram* (1938) All. 58, 173 I.C. 910, ('38) A. A. 44.

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for the payment of an antecedent debt (*e*). In this case the separate property consisted of property which was inherited by the father from his cousin and that property was mortgaged by the cousin during his life-time.

Time-barred debt.—The antecedent debt may be a time-barred debt. See s. 299 (2) below.

What is a debt :—

Unliquidated damages.—"Debt" ordinarily means a liquidated or ascertained sum of money as distinguished from unliquidated damages for beach of contract or for a tort. If a decree has been obtained against the father for damages for breach of contract or for a tort, the judgment debt constitutes a debt within the meaning of this section. But what if the amount of damages is not fixed by a decree or otherwise ? Is the *liability* for damages a debt within this section ? The question arose in a recent case before the Judicial Committee, but it was not decided (*f*). That was a case of a breach of contract by the father. It would seem on principle that a *liability* for damages constitutes a debt within this section ; if the liability is antecedent to the alienation, the alienation will be binding on the sons though the amount of damages is fixed on the very day on which the alienation is made.

Debt due but not payable.—A debt may be an antecedent debt though the due date of payment has not yet arrived. Hence an alienation even before the due date of payment would be an alienation for an antecedent debt (*g*).

Price payable under a pre-emption decree.—A pre-emption decree does not carry any *order* for payment. It gives an *option* to the pre-emptor to obtain the property on making payment. There being thus no *obligation* to pay, the purchase money fixed by the decree does not constitute a debt (*h*). See Code of Civil Procedure, 1908, O. 20, r. 15.

3. **The father alone can alienate the son's share.**—In the case of a joint family, the privilege of alienating the whole of the joint family property for payment of an antecedent debt is the privilege only of the father, the grandfather and the great-grandfather. No other person has any such privilege. Hence if a joint family consists of two brothers *A* and *B* of whom *B* is a minor, *A* may alienate, if he so desires, his own share in the joint family property to pay off an antecedent debt of his father *F*, but he has no power to alienate the share of his brother *B*, in the property, though *F* is also the father of *B* (*i*). Similarly if a joint family consists of *A* and his brother's son *B*, *B* being a minor, *A* may alienate his own share in joint family property to pay an antecedent debt of his father *G*, but he has no power to alienate *B*'s share to discharge that debt though *G* is the grandfather of *B* (*j*).

296. Alienation by father neither for legal necessity nor for antecedent debt—Son's liability.—(*1*) It is clear from what has been stated above that an alienation by the father of joint family property neither for a legal necessity nor for the payment of an antecedent debt does not bind the son's interest in the property. In Bengal and the United Provinces it does not bind even the father's interest in the property [ss. 268, 269]. But though the alienation *as such* does not bind the son's

(*e*) *Nand Lall* v. *Umrai* (1926) 1 Luck. 360, 93 I. C. 655, ('26) A.O. 321.

(*f*) *Mian Karim Bakhsh* v. *Dargah Pir* (1931) 35 C.W.N. 1221, 133 I.C. 728, ('31) A.PC. 243.

(*g*) *Damodaram* v. *Bansilal* (1928) 51 Mad. 711, 111 I.C. 297, ('28) A.M. 566.

(*h*) *Kishen Sahai* v. *Raghunath* (1929) 51 All. 473, 116 I.C. 488, ('29) A.A. 139.

(*i*) *Anantu* v. *Ram Prasad* (1924) 46 All. 295, 78 I.C. 619, ('24) A.A. 465.

(*j*) *Rameshra* v. *Kalpu Rai* (1924) 46 All. 264, 84 I.C. 84, ('24) A.A. 538.

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interest, the son being under a pious obligation to pay his father's debts *not tainted with immorality*, and the whole of the ancestral estate being liable for the payment of such debts, the alience is entitled to realise *the debt*, that is, the money paid by the alience to the father in consideration of the alienation, out of the entire ancestral estate (*k*).

By far the largest number of cases in which the above principle has been applied are cases of *mortgage* by the father of joint family property belonging to himself and his sons, where the mortgage is neither for legal necessity nor for payment of an antecedent debt. In such a case the son himself may sue for a declaration that the mortgage is not binding on his share and if he proves that the debt was contracted for illegal or immoral purposes to the knowledge of the lender he will be granted a declaration that the mortgage and the debt are not binding on him (*l*). In all these cases the mortgage *qua* mortgage cannot be enforced against the sons' interest in the mortgaged property, and *no mortgage decree* for the sale of that interest can be passed against the son. But the son is nevertheless under a pious obligation to pay the mortgage debt *qua* debt if it was not contracted for an illegal or immoral purpose. The son may therefore be successfully sued for the father's *debt*, and the decree passed in such suit may be enforced in execution by sale of the entire ancestral estate including the sons' interest therein (*m*). Cases under this head may be divided into three classes, namely—

(*i*) Where the suit to enforce the mortgage is brought both against the father and the sons.

(*ii*) Where such suit is brought against the father alone.

(*iii*) Where such suit is brought against the sons after the father's death.

(*k*) *Sami Ayyangar* v. *Ponnammal* (1898) 21 Mad. 28; *Venkataramanaya* v. *Venkataramana* (1906) 29 Mad. 200 [F.B.]; *Kandasami* v. *Kuppu* (1920) 43 Mad. 421, 55 I.C. 320, ('20) A.M. 479; *Ramasami* v. *Ulaganatha* (1899) 22 Mad. 49 [F.B.]; *Periasami* v. *Seetharama* (1904) 27 Mad. 243 [F.B.]; *Luchman Dass* v. *Giridhur* (1880) 5 Cal. 855 [F.B.]; *Gunga Prosad* v. *Ajudhia Pershad* (1882) 8 Cal. 131; *Khalilul Rahman* v. *Govind Pershad* (1893) 20 Cal. 328; *Kishun Pershad* v. *Tipan Pershad* (1907) 34 Cal. 735; *Brijnandan* v. *Bidya Prasad* (1915) 42 Cal. 1068, 29 I.C. 629, ('16) A.C. 279 [F.B.]; *Jamna* v. *Nain Sukh* (1887) 9 All. 493; *Chandradeo* v. *Mata Prasad* (1909) 31 All. 176, 194, 208, 1 I.C. 479 [F.B.]; *Kali Shankar* v. *Nawab Singh* (1909) 31 All. 507, 3 I. C. 909; *Narsingh* v. *Lalji* (1901) 23 All. 206; *Dattaraya* v. *Vishnu* (1912) 36 Bom. 68, 12 I.C. 949; *Chintamanrav* v. *Kashinath* (1890) 14 Bom. 320; *Polavarapu Lingayya & Ors.* v. *Vupputuri Punnayya & Ors.* (1942) Mad. 502, 198 I.C. 588, ('42) A.M. 183.

(*l*) *Krishnaji Lakshman* v. *Vithal* (1889) 12 Bom. 625.

(*m*) *Kandasami* v. *Kuppu* (1920) 43 Mad. 421, 55 I.C. 320, ('20) A.M. 479; *Chandradeo* v. *Mata Prasad* (1909) 31 All. 176, 194, 1 I.C. 479 [F.B.].

S. 296 (1) (i) In dealing with these cases it must be remembered that according to the law as administered in Madras and Bombay, a coparcener can mortgage his undivided interest in coparcenary property, and the mortgage binds his interest in the property [s. 268]. In Bengal and the United Provinces no coparcener can mortgage even his own interest in the coparcenary property *without the consent* of the other coparceners, with the result that the mortgage does not bind even the mortgagor's share in the property [s. 269]. Where a suit, therefore, is brought against the father and sons on a mortgage executed by the father neither for legal necessity nor for payment of an antecedent debt, the mortgagor in Madras is entitled to (1) a *mortgage decree* against the father for the sale of his interest, and (2) *if* the net proceeds of the sale of the father's interest are found to be insufficient to pay the amount due to the mortgagee, also to a *decree against the father personally* under O. 34, r. 6, of the Code ot Civil Procedure, 1908, and a decree for the sale of the entire joint family property including the sons, interest therein (*n*). In Bombay, the mortgage decree directs a sale in execution of the entire joint family property including the sons' interest therein instead of directing a sale piecemeal as in Madras (*o*). In the United Provinces, the mortgage does not bind even the father's interest in the property. Hence no *mortgage decree* can be passed for the sale even of the father's interest. The only decree that can be passed is a money decree against the father and a decree for a sale in execution of the entire joint family property including the sons' interest therein (*p*). The result, it seems, should be the same in Bengal, but it has there been held that the mortgagee is entitled to a *mortgage decree* against the father for the sale of his interest in the property, and also to a decree, *if* the net proceeds of the sale of the father's interest be insufficient to pay the amount due to the mortgagee under the decree, for the sale of the sons' interest in the entire joint family property so far as may be necessary to satisfy the amount due (*q*). But where the mortgagee

(*n*) (1920) 43 Mad. 421, 55 I.C. 320, ('20) A.M. 479, *supra*; *Sami Ayyangar* v. *Poonnammal* (1897) 21 Mad. 28; *Venkataramanaya* v. *Venkataramanna* (1905) 29 Mad. 200 [F.B.].

(*o*) *Dattatraya* v. *Vishnu* (1912) 36 Bom. 68, 12 I. C. 949; *Chintamanrav* v. *Kashinath* (1890) 14 Bom. 320.

(*p*) *Kalishankar* v. *Nawab Singh* (1909) 31 All. 507, 3 I. C. 909; *Chandradeo* v. *Mata Prasad* (1909) 31 All. 176, 208, 1 I.C. 479 [F.B.]; *Jumna* v. *Nain Sukh* (1887) 9 All. 493; *Jai Narain* v. *Mahabir Prasad* (1927) 2 Luck. 226, 236, 95 I.C. 857, ('26) A.O. 470.

(*q*) *Kishun Pershad* v. *Tipan Pershad* (1907) 34 Cal. 735; *Luchmun Dass* v. *Giridhur* (1880) 5 Cal. 855 [F.B.]; *Gunga Proshad* v. *Ajudhia Pershad* (1882) 8 Cal. 131; *Khalilul Rahman* v. *Gobind Persad* (1893) 20 Cal. 328; *Brijnandan* v. *Bidya Prasad* (1915) 42 Cal. 1068, 29 I.C. 629, ('16) A.C. 279 [F.B.].

asks for a money decree against the father only and not against the son or where the suit was dismissed against the sons (r), the decree cannot be executed against the son's interest in the joint family property (s). See note below, "Consideration of Calcutta cases referred to in this section."

(ii) The next case is where the mortgagee sues the father alone. In such a case the mortgagee may, at his option, obtain a simple *money decree* against the father for the whole of the mortgage debt, and have the entire joint family property, including the sons' interest therein, sold in execution of the decree (t). The sons, *though not parties to the suit,* are bound by the *sale* by reason of their pious duty to pay their father's debt and they cannot recover their share of the property unless they prove that the debt was contracted by the father for an immoral purpose [s. 294].

Or the mortgagee may, at his option, obtain a *mortgage decree* for the sale of the mortgaged property. In this case also, if the entire mortgaged property is *sold* in execution of the decree, the sons, *though not parties to the suit,* are not entitled to recover their share of the property unless the debt was contracted by the father for an immoral purpose [see the cases cited in s. 294 B (*2*), pp. 363-364]. This rule has not been altered by s. 85 of the Transfer of Property Act, 1882, now replaced by O. 34, r. 1, of the Code of Civil Procedure, 1908. The effect of the decisions since the passing of the Transfer of Property Act is that where ancestral property belonging to a joint family *has been sold* in execution of a decree for sale on a mortgage executed by the father for his sole benefit, the sons cannot maintain a suit for redemption of their interest in the property sold solely upon the ground that they had not been made parties to the suit of the mortgagee, nor is their position improved by the fact that the property at the execution sale was purchased by the mortgagee. Their suit must be based upon some ground which would free them from liability as sons in a joint Hindu family to pay their father's debts. namely, the non-

(r) *Kesho Ram* v. *Musammat Ram Dulari* (1942) 17 Luck. 319, 196 I.C. 680, ('42) A.O. 9.

(s) *Jainarayan Mulchand* v. *Sonaji* (1938) Nag. 136, 174 I. C. 621, ('38) A. N. 24; *Bijai Raj Singh* v. *Ram Padarath* (1936) 11 Luck. 523, 158 I.C. 490, ('36) A.O. 139.

(t) Is the mortgagee entitled to have the *mortgaged* property sold? See Code of Civil Procedure, 1908, O. 34, r. 14.

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existence of the debt or the immoral character of the debt (*u*).

As to the sons' remedy before suit, see sec. 294A (*2*).

(iii) The last case is where the suit is brought by the mortgagee against the sons after the father's death. In this case the mortgagee may obtain a money decree against the sons which may be enforced by a sale of the entire joint family property, unless the suit against the sons is barred by limitation [sec. 293 (*2*)]. He is also entitled, in Bombay (*v*) and Madras, to a mortgage decree limited to the father's interest in the mortgaged property, provided that the suit as a mortgage suit is not barred by limitation. In the United Provinces no mortgage decree can be passed against the father's interest whether the father be alive or dead; it follows that if the suit against the sons is barred by limitation, the mortgagee has no remedy at all in respect of his claim (*w*). There is no Calcutta decision bearing on the question whether a mortgage decree can be passed against the father's interest *after his death* (*x*).

(*2*) *Where the debt is immoral.*—If the debt contracted by the father is tainted with immorality, the mortgagee is not entitled to proceed against the sons' interest at all. All that he is entitled to, in Bombay and Madras, is a mortgage decree limited to the father's interest in the mortgaged property. So too, it seems, in Bengal. In the United Provinces, a mortgage by the father of his own undivided interest without the consent of the sons does not bind even the father's interest in the property, and the mortgagee is not entitled to a mortgage decree limited even to that interest. But he may obtain a money decree against the father which he may execute by a sale of the father's interest in the joint family estate (*y*).

Consideration of Calcutta cases referred to in the section.—The principle that a *sale* of mortgaged property in execution of a mortgage decree passed against the father alone on a mortgage executed by him neither for legal necessity nor for an antecedent debt, passes

(*u*) *Debi Singh* v. *Jia Ram* (1903) 25 All. 214 [F.B.]; *Lal Singh* v. *Pulandar Singh* (1906) 28 All. 182; *Balwant Singh* v. *Aman Singh* (1911) 33 All. 7, 7 I. C. 112; *Kehri Singh* v. *Chunni Lal* (1911) 33 All. 436, 9 I. C. 476; *Gajadhar* v. *Jadubir* (1925) 47 All. 122, 35 I.C. 31, ('25) A.A. 180; *Ramasamayyan* v. *Virasami* (1898) 21 Mad. 222; *Palani* v. *Rangayya* (1899) 22 Mad. 207; *Ramkrishna* v. *Vinayak* (1910) 34 Bom. 354, 5 I.C. 967; *Jahan Singh* v. *Hardat Singh* (1935) 57 All. 357, 152 I.C. 487, ('35) A.A. 247. In *Bhawani Prasad* v. *Kallu* (1895) 17 All. 537 [F.B.], the sons' suit was brought before sale. See also *Kanhaiya Lal* v. *Raj Bahadur* (1902) 24 All. 211; *Lala Suraj* v. *Gulab Chand* (1901) 28 Cal. 517.

(*v*) See *Chintamanrav* v. *Kashinath* (1890) 14 Bom. 320.

(*w*) See *Chandradeo Singh* v. *Mata Prasad* (1909) 31 All. 176, 179, 1 I.C. 479 [F.B.].

(*x*) See *Madho Parshad* v. *Mehrban Singh* (1890) 18 Cal. 157, 17 I.A. 194, which was a case of sale.

(*y*) *Shiva Nath* v. *Tulsi Ram* (1926) 48 All. 1, 89 I.C. 480, ('25) A. A. 801. But see Code of Civil Procedure, 1908, O. 34, r. 14.

not only the father's, but the sons' interest in the property [sub-sec. (1) (ii)], was established by the rulings of the Privy Council in *Mst. Nanomi* v. *Modun* (z), decided in 1886 and *Bhagbut* v. *Girja Koer* (a), decided in 1888. The principle that no *mortgage decree* can be passed against the sons in a suit on such a mortgage was first laid down by a Full Bench of the Calcutta High Court in 1880 in the case of *Luchmun Dass* v. *Giridhur* (b). In two later cases (c), it was held by the Court of Calcutta that since a *sale* in execution of a mortgage decree against the father alone passes not only the father's, but the sons' interest in the mortgaged property as decided in the two Privy Council cases, the Court could also pass a *mortgage decree* against the sons, and that the Full Bench ruling in *Luchmun Dass*'s case (d) was no longer good law since the Privy Council decisions. In both these cases the Court overlooked the fact that there was a distinction between the position of the son where the mortgage created by the father was *sought to be enforced* against his interest in the property, and his position *after the sale* in execution of the decree against the father; that distinction, whether it was logical or not, has long since been recognised. In two cases (d1), again it was held by that Court that the aforesaid Full Bench ruling was superseded by s. 85 of the Transfer of Property Act, 1882, now O. 34, r. 1, of the Code of Civil Procedure, 1908. All these decisions were subsequently overruled by a Full Bench of the same High Court in *Brijnandan* v. *Bidya Prasad* (e), and it was held that there was nothing either in the above mentioned decisions of the Privy Council or in the provisions of s. 85 of the Transfer of Property Act to justify the view that a mortgage created by a father was operative as such against the sons, and that the decision in the Full Bench case that no mortgage decree can be passed against the sons, but only a money decree, was still good law. It was also held that as the charge could not be enforceable against the sons, article 132 of the Schedule to the Indian Limitation Act, 1908, had no application and that article 120 governed the case.

It has been stated above that though according to the Mitakshara law as administered in Bengal, the father cannot alienate his own undivided interest in the coparcenary property without the consent of his sons, the Calcutta High Court has held that the mortgagee is entitled to a mortgage decree against the father. The leading case on the subject is *Luchmun Dass* v. *Giridhur* (f) decided by a Full Bench in 1880. The facts of the case are stated in *Khalilul Rahman* v. *Gobind Pershad* (1893) 20 Cal. 328, 342-348, and the decree passed by the High Court after the Full Bench had returned the answers to the questions submitted to them is set forth on p. 351 of the report. In *Luchmun Dass*'s case, the lower Court had passed a *mortgage decree* for the sale of the *father's* interest but it wholly dismissed the mortgagee's suit against the sons. In so doing the Court purported to follow an earlier ruling of the same High Court (g). The question before the Full Bench was as to the extent of the liability of the *sons* in respect of the mortgage debt. There was no question as to whether a mortgage decree could be passed against the *father*. On the question before them the Full Bench held that no mortgage decree could be passed against the sons, but the sons being under a pious obligation to pay the father's debt, their share was liable to be sold if the net sale proceeds of the father's interest were not sufficient to satisfy the mortgagee's claim in full.

297. Where purchase money applied in part only in payment of antecedent debt.

—It sometimes happens that joint family property is sold by the father of a joint family for the payment of an antecedent debt, but the whole of the price is not

(z) (1886) 13 Cal. 21, 36, 13 I. A. 1.
(a) (1888) 15 Cal. 717, 721, 724, 15 I.A. 99.
(b) (1880) 5 Cal. 855.
(c) *Maheshwar* v. *Kishun* (1907) 34 Cal. 184; *Sheo Narain* v. *Mokshoda Das* (1913) 17 C. W. N. 1022, 19 I. C. 878.
(d) See *Jamna* v. *Nain Sukh* (1887) 9 All. 493, 494; *Kishun Pershad* v. *Tipan Pershad* (1907) 34 Cal 735, 745-746.
(d1) *Biswanath* v. *Jagdip* (1913) 40 Cal 342, 17 I. C. 577, (1913) 17 C. W. N 1022, 19 I. C. 878, *Supra*.
(e) (1915) 42 Cal. 1068, 29 I.C. 629, (16) A. C. 279 [F.B.].
(f) (1880) 5 Cal. 855.
(g) *Bhaknarain* v. *Januk* (1877) 2 Cal. 438.

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proved to have been *applied* in payment of such debt, and the sale is challenged by the sons on that ground. In such a case, if the sale was necessary to discharge the debt, and the purchaser pays a fair price for the property sold, and acts in good faith and after due inquiry as to the necessity for the sale, the mere fact that part of the price is not proved to have been applied in payment of the debt does not invalidate the sale, the reason being that the purchaser is not bound to see to the *application* of the price. If the above conditions are satisfied, the sale must be upheld unconditionally, whether the part not proved to have been applied in payment of the debt is considerable or small (*h*). See ss. 189, 245.

The above principles have been laid down by the Judicial Committee in cases of sales by the manager of joint family property for legal necessity, but the same principles apply to cases of sales by the father for the payment of an antecedent debt.

In an earlier Privy Council case, where one property was sold for Rs. 2,000, and Rs. 338 was not proved to have been applied in payment of the father's debts, and another property was subsequently sold for Rs. 2,000 and Rs. 1,847 was not proved to have been applied in payment of the debts, their Lordships set aside both the sales conditionally on payment by the sons, who were the plaintiff's in the suit, to the purchaser of the sums actually applied in payment of the debts (*i*). It is conceived that if such a case arose again, both the sales would be upheld if the conditions stated in the section were satisfied. See notes to ss. 189 and 245.

298. Immoral (avyavaharika) debt.—Sons, grandsons and great-grandsons are bound to pay all debts contracted by the father, grandfather or great-grandfather except the following debts (*j*) :—

(1) debts for spirituous liquors ;

(2) debts due for losses at play ;

(3) debts due for promises made without consideration ;

A promissory note for a time-barred debt is not a promise without consideration (*k*).

(4) debts contracted under the influence of lust or wrath ;

(5) debts for being surety for the appearance or for the honesty of another (*l*) ;

(*h*) *Krishna Das* v. *Nathu Ram* (1927) 54 I A. 79, 49 All. 149, 100 I.C. 130, ('27) A.PC. 37 [case of legal necessity]; *Niamat Rai* v. *Din Dayal* (1927) 54 I. A. 211, 8 Lah. 597, 101 I.C. 373, ('27) A.PC. 121; *Masit Ullah* v. *Damodar Prasad* (1926) 53 I.A. 204, 48 All. 518, 98 I.C. 1031, ('26) A.PC. 105 [case of legal necessity]; *Gokha Ram* v. *Sham Lal* (1922) 3 Lah. 426, 77 I.C. 174, ('23) A.L. 268 [antecedent debt]; *Buta Mal* v. *Gopal Singh* (1930) Lah. 164, 122 I.C. 480, ('30) A. L. 1040. The decision in *Sanmukh* v. *Jagarnath* (1924) 46 All. 531, 83 I.C. 83, ('24) A. A. 708 [antecedent debt], is no longer good law; see the judgment in 54 I.A. 79, referred to above.

(*i*) *Banwari Lal* v. *Mahesh* (1918) 45 I. A. 284, 41 All. 63, 49 I.C. 540, ('17) A.PC. 118.

(*j*) *Khalilul* v. *Gobind* (1893) 20 Cal. 328, 336, 337.

(*k*) *Gajadhar* v. *Jagannath* (1924) 46 All. 775, 787, 80 I.C. 684, ('24) A.A. 551 [F.B.].

(*l*) *Tukaram* v. *Gangaram* (1899) 23 Bom. 454, 456, 458. See also *Mahabir* v. *Siri Narayan* (1918) 3 Pat. L. J. 396, 46 I.C. 27, ('18) A.P. 345.

(6) unpaid fines (*m*) ; S. 298

(7) unpaid tolls ; and

(8) any debt which is *avyavaharika* which is rendered by Colebrooke as equivalent to a debt for a cause "repugnant to good morals."

Surety.—According to Vrihaspati, there are four different classes of sureties, namely, sureties (1) for appearance, (2) for honesty, (3) for payment of money lent, and (4) for delivery of goods. In respect of the first two kinds, the sons are not liable unless the father received consideration for accepting the suretyship. In respect of the last two kinds the sons are liable, but the grandsons are not liable unless the grandfather received consideration for accepting the suretyship. It has thus been held that when the father is surety for repayment of a *loan*, the son is clearly liable (*n*) but the grandson is not unless consideration was received by the grandfather for accepting the suretyship (*o*). A guarantee given by the father for payment of *rent* by a tenant is a guarantee for payment of a debt (*p*), and so is a guarantee for payment of money that may be decreed against a defendant in a suit (*q*). A debt incurred by a father as a surety for payment of money is binding on the son as a mere money debt but a hypothecation of the family property for such a debt is not binding on the property (*r*). But a surety bond hypothecating joint property by which the father guarantees payment of loss that may be caused to the estate of a minor by misappropriation or waste by a guardian is a bond for the honesty of another [see cl. (5) above], and is not binding on the sons (*s*); unless the security bond is executed for a debt of the father (*t*); if under such a bond the property is sold, the son is entitled to recover his share therein (*u*). It has been held by the Patna High Court that a debt incurred by a father for standing surety against embezzlement by a tahsildar is not binding on the sons (*v*) [see cl. (5) above]. But it has been held by the same High Court that the sons are liable for money borrowed by their father to enable his wife's cousin to refund money which he had misappropriated or could not account for (*w*).

Debt for a cause repugnant to good morals—The fundamental rule is that the sons are not liable for debts incurred by a father which are *avyavaharika*. Colebrooke translates it as "debts for a cause repugnant to good morals," Aparaka explains it as not righteous or proper, and Balambhatti as not for the benefit of the family (*x*).

Where money was borrowed by the father for the purpose of defraying the expenses of the marriage of his concubine's grand daughter, it is avyavaharika even if the concubine was in his continuous and exclusive keeping (*y*).

(*m*) *Nhanee* v. *Hureeram* (1811) 1 Bor. 84, 90.
(*n*) *Tukaram* v. *Gangaram* (1899) 23 Bom. 454 ; *Sitaramayya* v. *Venkataramanna* (1888) 11 Mad. 373 ; *Chettikulam* v. *Chetikulam* (1905) 28 Mad. 377 ; *Thangathammal* v. *Arunachalam* (1918) 41 Mad. 1071, 48 I.C. 76, ('19) A.M. 831 ; *Rasiklal* v. *Singheshwar* (1912) 39 Cal. 813, 14 I.C. 847 ; *Dwarka Das* v. *Kishan Das* (1933) 55 All. 675, 147 I.C. 1048, ('33) A.A. 587.
(*o*) *Narayan* v. *Venkatacharya* (1904) 28 Bom. 408.
(*p*) *Maharaja of Benares* v. *Ramkumar* (1904) 26 All. 611.
(*q*) *Mata Din* v. *Ram Lakhan* (1930) 52 All. 153, 120 I.C. 555, ('30) A.A. 87 ; *Malak Chand* v. *Higalal* (1936) 11 Luck. 449, 157 I.C. 945, ('35) A.O. 510.
(*r*) *Thakur Satrohan Singh* v. *Uma Dutt* (1936) 11 Luck. 404, 157 I.C. 653, ('35) A.O. 455 ; *Malak Chand* v. *Hiralal* (1936) 11 Luck. 449, 157 I.C. 945, ('35) A.O. 510.
(*s*) *Kottapalli Lakshminarayana* v. *Kanuparti Hanumantha Rao* (1935) 58 Mad. 375, 154 I.C. 431, ('35) A.M. 144.
(*t*) *Kesarchand* v. *Uttamchand* (1945) 52 I.A. 165 ; (1945) 2 M.L.J. 160.
(*u*) *Choudhuri* v. *Hayagriba* (1931) 10 Pat. 91, 138 I.C. 414, ('32) A.P. 162.
(*v*) *Satya Charan* v. *Satpir* (1919) 4 Pat. L. J. 309, 51 I. C. 791, ('19) A.P. 422.
(*w*) *Benares Bank, Ltd.* v. *Jagdip* (1921) 6 Pat. L. J. 158, 62 I.C. 465, ('21) A.P. 9.
(*x*) See *Bai Mani* v. *Usufali* (1931) 33 Bom. L. R. 130, 133, 136 I.C. 173, ('31) A.B. 229.
(*y*) *Lakshminaswami* v. *Raghavacharulu* (1943) Mad. 717, 210 I.C. 98, ('43) A.M. 292.

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A debt may arise out of a *contract* as where money is borrowed by the father, or it may arise out of an act which amounts to a *criminal offence, e.g.*, theft, or it may arise out of a *tort or civil wrong*.

Money borrowed by a father for payment to a Hindu woman as a bribe to induce her to take one of his sons in adoption is an *avyavaharika* debt, and the sons are not liable for it (z). So is money borrowed to pay a fine inflicted for a criminal offence (a). The High Court of Madras has held that money borrowed to pay the cost of a suit *in forma pauperis* brought by the father knowing it to be false is an *avyavaharika* debt (b). The Calcutta High Court has held that money borrowed by the father for litigation to set up an adoption is not an *avyavaharika* debt and that the sons are liable for it (c). The same High Court has also held that the sons are liable to pay the costs of a suit decreed against the father, though the litigation was imprudent (d).

Where money is obtained by a father by committing a criminal offence, *e.g.*, theft and a decree is passed against him for the money so obtained by him, the sons are not liable for the decretal amount (e). The same rule applies in respect of money taken by a father and misappropriated under circumstances which constitute *the taking itself* a criminal offence (f), *e.g.*, misappropriation by the father as a guardian of money belonging to the minor (g), or a criminal breach of trust (h). No decree can be passed against the sons of a stake-holder of a chit fund in respect of the latter's liability to a subscriber as the debt is illegal (i). [See also *Sesha Ayyar* v. *Krishna Ayyar* (1936) 59 Mad. 562, 162 I.C. 68, ('36) A.M. 225, where it was held by a Full Bench that such a fund was a lottery and by three Judges out of five that its promoters were guilty of offences under both parts of section 294A of the Indian Penal Code.] Where the father's debt was, at its inception, a just and true debt, the subsequent dishonest conduct of the father cannot affect its nature. Thus, when the father withheld a promissory note allotted in a partition decree to the opposite party which he was directed to deposit in Court his conduct in first filing a forged note and then filing the real note after it was barred cannot save the son's liability under the decree passed against the father for the loss (j) But where a father is under a *civil* liability to account for money received by him, *e.g.*, as an administrator of the estate of a deceased person, or as a trustee, or as an agent or manager, and he fails to account, and a decree is passed against him for money not accounted for by him, the sons are liable for the amount of the decree though the father may have retained the money dishonestly, provided the retention itself does not amount to a criminal offence, that is, the offence of criminal breach of trust or criminal misappropriation (k). Where the receipt of the money was lawful at the time of the receipt, even the subsequent commission of an offence by the father does not save the sons' liability (l). The burden is on the sons to show that the retention itself amounted to a criminal offence (m).

A Hindu father erects a dam which obstructs the passage of water to the property of his neighbour. The Court finds that the father had no right in law to erect the dam and a decree is passed against the father for damages. Are the sons liable for the amount of the decree ? It has been held by the High Court of Bombay in *Durbar* v. *Khachar* (n)

(z) *Sitaram* v. *Harihar* (1911) 35 Bom. 169, 8 I.C. 625.

(a) *Garuda Sanyasayyan* v. *Nerella Murthenna* (1918) 35 Mad. L.J. 661, 48 I.C. 740, ('19) A.M. 943.

(b) *Ramaiengar* v. *Secretary of State* (1910) 20 Mad. L.J. 89, 41 I.C. 105.

(c) *Khalilul* v. *Gobind* (1893) 20 Cal. 328.

(d) *Parvag* v. *Kasi* (1909) 14 C.W.N. 659, 6 I.C. 258.

(e) *Pareman Dass* v. *Bhattu* (1897) 24 Cal. 672.

(f) *Mahabir Prasad* v. *Basdeo Singh* (1884) 6 All. 234; *McDowell & Co.* v. *Ragava* (1904) 27 Mad. 71; *Jagannath* v. *Jugal Kishore* (1926) 48 All. 9, 89 I.C. 492, ('26) A.A. 89; (1931) 33 Bom. L.R. 130, 136 I.C. 173, ('31) A.B. 229, *supra*.

(g) (1931) 33 Bom. L.R. 130, 136 I.C. 173, ('31) A.B. 229, *supra*.

(h) *Srimathi Widyavanti* v. *Jai Dayal* (1932) 13 Lah. 356, 140 I.C. 220, ('32) A.L. 541.

(i) *Muniyandia* v. *Muthusami* (1939) Mad. 70.

(j) *Hemraj alias Balu Pai & Ors.* v. *Khemchand & Ors.* (1943) All. 727, 209 I.C. 344, 70 I.A. 171, ('43) A.PC. 142.

(k) *Natasayan* v. *Ponnusami* (1893) 16 Mad. 199, 104; *Kanemar* v. *Krishna* (1908) 31 Mad. 161 [manager]; *Gurunatham* v. *Raghavalu* (1908) 31 Mad. 472 [administrator]; *Venkatacharyulu* v. *Mohana* (1921) 44 Mad. 214, 61 I.C. 530, ('21) A.M. 407 [agent]; *Gursarn Das* v. *Mohan Lal* (1923) 4 Lah. 93, 76 I.C. 907, ('23) A.L. 399 [manager]; *Hanmant* v. *Ganesh* (1919) 43 Bom. 612, 51 I.C. 612, ('18) A.B. 13 [trustee]; *Toshanpal* v. *District Judge of Agra* (1929) 51 All. 386, 112 I.C. 748, ('28) A.A. 582 [Secretary of a School Committee]. See also *Jaikumar* v. *Gauri Nath* (1906) 28 All. 718, 720; *Mohant Gadadhar* v. *Ghana Shyam Das* (1918) 3 Pat. L.J. 533, 47 I.C. 212, ('18) A.P. 391.

(l) *Alapati Anandrao & Ors.* v. *The President, Co-operative Credit Society, Pedatadipalli, & Ors.* (1941) Mad. 27, 191 I.C. 755, ('40) A.M. 828.

(m) *Toshanpal Singh* v. *District Judge of Agra* (1934) 56 All. 548, 61 I.A. 350, 151 I.C. 33, ('34) A.PC. 238.

(n) (1908) 32 Bom. 348.

that they are not liable, the reason given being that such a debt is *avyavaharika*, that is, a debt which the father ought not, "as a decent and respectable man," to have incurred. This interpretation of the word *avyavaharika* has not been accepted by the High Court of Calcutta. According to that Court, the sons are liable for a decree against the father or damages on account of injury caused to crops by obstruction of a channel (*o*). They are also liable for a decree against the father for mesne profits (*p*). The view taken in *Durbar*'s case has also been disapproved by the High Court of Madras (*q*). The High Court of Allahabad has also dissented from that view, and held that the sons are liable for money borrowed by the father to defend a suit for defamation (*r*), or to defend himself against charges of forgery and fabrication (*s*); also that they are liable for a decree against the father for damages for wrongfully cutting down trees (*t*). The authority of the decision in *Durbar*'s case was treated as doubtful in a later Bombay case where it was held that a debt contracted by a father in a trade carried on by him in contravention of the Government Servants' Conduct Rules was not *avyavaharika*, the liability in such a case being merely civil as distinguished from criminal (*u*).

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The Patna High Court has held that the sons are liable for money borrowed by the father to meet the expenses of defending himself against a charge under the Cattle Trespass Act, 1871 (*v*), but they are not liable for a decree passed against the father for damages for malicious prosecution (*w*).

Where money was borrowed by the father for assisting in the prosecution of a person accused of the murder of a member of the family, it was held that the debt though not one for a legal necessity was not illegal or immoral (*x*).

Where the father has taken a lease for a term but continued in possession after the expiry of the term, the sons are liable for the mesne profits as the possession is not necessarily immoral (*y*).

Commercial debts.—The text of Gautama, chapter XII, s. 41, to the effect that the sons are not liable for their father's commercial debts has long become obsolete, and sons are now liable for simple money debts incurred by the father in the course of business even though started by the father himself (*z*) [s. 240]. If a money decree is passed against the father alone for such debts, the sons cannot resist in execution (*a*). Such debts though speculative are good as antecedent debts to support a further mortgage (*b*) as they are not repugnant to good morals (*c*).

299. Time-barred debt.—(*1*) The Hindu law does not recognise any rule of limitation for the recovery of debts. A Hindu, therefore, is bound according to that law to pay

(*o*) *Chhakauri* v. *Ganga* (1912) 39 Cal. 862, 12 I.C. 609. See *Kirpal Singh* v. *Balwant Singh* (1913) 40 Cal. 288, 17 I.C. 660 [P.C.] which turned upon a special custom of agriculturists in the Punjab.

(*p*) *Peary Lal* v. *Chandicharan* (1906) 11 C. W. N. 163.

(*q*) *Venugopala* v. *Ramanadhan* (1914) 37 Mad. 458, 14 I.C. 705, ('14) A.M. 654 [costs of litigation].

(*r*) *Sumer Singh* v. *Liladhar* (1911) 33 All. 472, 19 I.C. 624.

(*s*) See *Beni Ram* v. *Man Singh* (1912) 34 All. 4, 11 I. C. 663.

(*t*) *Chandrika* v. *Narain* (1924) 46 All. 617, 79 I.C. 1036, ('24) A.A. 745.

(*u*) *Ramkrishana* v. *Narayan* (1916) 40 Bom. 126, 31 I.C. 301, ('15) A.B. 280.

(*v*) *Hanumat* v. *Sonadhari* (1919) 4 Pat. L.J. 653, 62 I.C. 734, ('20) A.P. 708.

(*w*) *Sunder Lal* v. *Raghunandan* (1924) 3 Pat. 250, 83 I. C. 413, ('24) A.P. 465; *Raghunandan Sahu* v. *Badri Teli* (1938) All. 330, 175 I. C. 607, ('38) A.A. 263.

(*x*) *Marudappan* v. *Siraikulathan* (1937) Mad. 1943, 169 I.C. 292, ('37) A. M. 434.

(*y*) *Pashupati Pratap Singh* v. *Lalat Bahadur Singh* (1945) All. 5.

(*z*) *Achutaramayya* v. *Ratnajee* (1926) 49 Mad. 211, 92 I.C. 977, ('26) A.M 323 [hardware trade]; *Annabhat* v. *Shivappa* (1928) 52 Bom. 376, 110 I.C. 269, ('28) A.B. 232; *Venkateswara Rao* v. *Ammayya* ('39) A.M. 561.

(*a*) *Chotkao Singh* v. *Hasan* (1930) 5 Luck. 184, 119 I.C. 458, ('29) A.O. 458; *Pirthi Singh* v. *Mam Chand* (1935) 16 Lah. 1077, 156 I.C. 539, ('35) A.L. 761.

(*b*) *Khemchand* v. *Narin Das* (1925) 6 Lah. 493, 498, 89 I.C. 1022, ('26) A.L. 41; *Venkatasami* v. *Palaniappa* (1929) 52 Mad. 227, 117 I.C. 716, ('29) A.M. 153.

(*c*) *Chotkao Singh* v. *Hasan* (1930) 5 Luck. 184, 119 I.C. 458, ('29) A.O. 458.

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a debt owing by him, though it is barred by the statute of limitations; if he dies without paying the debt, his sons are under a moral and religious obligation to discharge the debt. But a Hindu is not bound since the enactment of the Indian Limitation Act, 1908, and the Acts which preceded it, to pay a time-barred debt, and it has accordingly been held that if the debt was barred against the father, the sons are no longer under a pious obligation to pay such debt (*d*). But a Hindu father may, like any other debtor, pass a promissory note for a time-barred debt. Such a note constitutes a binding contract having regard to the provisions of s. 25 (3) of the Indian Contract Act, 1872 and it may be enforced against him, and after his death, against the sons. The sons, however, are liable only to the extent of the estate, whether ancestral or self-acquired, which has come to their hands on the father's death (*e*). The liability in such a case does not rest upon any obligation moral or religious, but on the general principle of the Anglo-Indian law. Even if the sons themselves execute a promissory note for a time-barred debt of their father after the father's death, the note is available only against the ancestral or self-acquired property, which has come to their hands. There is nothing in sec. 25 (3) of the Contract Act to render them personally liable on such a note (*f*).

(*2*) A time-barred debt, under the Hindu law, is not *avyavaharika*, that is to say, it is not immoral. It has accordingly been held that when the father alienates joint family property in consideration of a debt that is barred by the law of limitation, the alienation is binding on the sons (*g*).

300. Debt contracted by father during minority or other disability.—A promissory note passed by the father for a debt contracted by him during his minority or while he was a ward of the Court of Wards is void (*h*), and the son is under no pious obligation to pay it. The pious obligation, however, arises if the note is renewed by the father after attaining majority (*i*).

(*d*) *Subramania* v. *Gopala* (1910) 33 Mad. 308, 7 I.C. 898; *Gajadhar* v. *Jagannath* (1924) 46 All. 775, 782, 80 I.C. 684, ('24) A.A. 551 [F.B.]; *Achutanand* v. *Surajnarain* (1926) 5 Pat. 746, 753-754, 95 I.C. 991, ('26) A.P. 427.

(*e*) *Narayanasami* v. *Samidas* (1883) 6 Mad. 293; *Ram Kishan* v. *Chhedi Rai* (1922) 44 All. 628, 68 I.C. 235, ('22) A.A. 402.

(*f*) *Asa Ram* v. *Karam Singh* (1929) 51 All. 983, 119 I. C. 109, ('29) A.A. 586.

(*g*) *Gajadhar* v. *Jagannath* (1924) 46 All. 775, 80 I. C. 684 ('24) A.A. 551 [F.B.]; *Jagdambika* v. *Kali* (1930) 9 Pat. 848, 129 I.C. 130, ('31) A.P. 40; *Parmanand Misir* v. *Gur Prasad* (1936) 11 Luck. 393, 157 I.C. 567, ('35) A.O. 500.

(*h*) *Baldeo* v. *Bindeshri* (1922) 44 All. 388, 66 I.C. 128, ('22) A.A. 215.

(*i*) *Ram Rattan* v. *Basant Rai* (1921) 2 Lah. 263, 64 I.C. 121, ('21) A.L. 205.

301. Summary of the Chapter.—(*1*) *The separate property* of a Hindu is liable for the payment of his debts in his lifetime as well as after his death. S. 301

(*2*) The *undivided interest* of a coparcener in coparcenary property is *always* liable for the payment of his debts *in his lifetime.*

(*3*) Where a coparcenary consists of collaterals, the undivided coparcenary interest of a coparcener is not liable for the payment of his debts *after his death* unless such interest was attached in his lifetime. But where a coparcenary consists of an ancestor and his sons, grandsons or great-grandsons, and the ancestor dies leaving debts, the whole coparcenary property including the undivided interest of the ancestor in such property is liable for his debts even after his death, provided the debts were not contracted for an immoral or unlawful purpose.

(*4*) Sons, grandsons and great-grandsons are liable to pay the debts of their ancestor if they have not been incurred for an immoral or unlawful purpose. Their liability, however, is confined to their interest in the coparcenary property; it is not a personal liability so that a creditor of the ancestor cannot proceed against the person or against the separate property of the sons, grandsons or great-grandsons.

(*5*) As sons, grandsons and great-grandsons are liable to pay the lawful debts of their ancestor to the extent of their interest in the coparcenary property, a creditor of the ancestor is entitled to attach and sell not only the interest of the ancestor, but also the interest of the sons, grandsons and great-grandsons in the joint family property in execution of a decree obtained by him against *the ancestor alone.*

(*6*) As sons, grandsons and great-grandsons are liable to pay the lawful debts of their ancestor to the extent of their interest in the coparcenary property, the ancestor can sell or mortgage not only his own interest, but the interest of the sons, grandsons, and great-grandsons in the joint family property, to pay an *antecedent debt of his own.*

CHAPTER XV

DEBTS—DAYABHAGA LAW.

Preliminary note.—As under the Mitakshara law, so under the Dayabhaga law a debt may be contracted by a Hindu for purposes of the joint family or for his own private purposes. Debts contracted for joint family purposes have been dealt with in ss. 234, 240 and 244. The rules laid down in those sections apply to cases both under the Mitakshara and the Dayabhaga law. The present chapter deals with the Dayabhaga law of debts contracted by a Hindu for his own private purposes. The Dayabhaga law of debts is very simple, for no question can arise under that law as to the special liability of sons and grandsons as it does under the Mitakshara law. The reason is that under the Dayabhaga law sons do not acquire by birth any interest in ancestral property as they do under the Mitakshara law [ss. 273-274]. And, further, each coparcener under the Dayabhaga law takes a defined share in the coparcenary property which he can deal with at his pleasure and which on his death passes to his heirs and not to the surviving coparceners [ss. 279-282]. With these preliminary remarks we proceed to state the rules of the Dayabhaga law of debts.

S. 302 **302. Debts—Bengal School.**—(*1*) As under the Mitakshara law, so under the Dayabhaga law, the separate property of a Hindu is liable for the payment of his debts in his lifetime as well as after his death.

(*2*) As each coparcener under the Dayabhaga law takes a *defined interest* in the coparcenary property, which on his death passes not by survivorship to his coparceners, but to his heirs by succession such interest is liable for the payment of his debts not only in his lifetime but also after his death, as assets in the hands of his heirs.

(*3*) Since sons, grandsons and great-grandsons do not under the Dayabhaga law acquire any interest by birth in ancestral property, the father can sell or mortgage the whole of the ancestral property in his hands for the payment of his debts, whatever may be the character of the debts.

On the death of a Hindu governed by the Dayabhaga law, his separate property as well as his undivided interest in coparcenary property passes to his heirs and they become assets of the deceased in their hands. Therefore, if he dies leaving debts, the heirs are bound to pay the debts not only out of the separate property left by the deceased but also out of his undivided interest in the coparcenary property. The heirs, however are not personally liable for the debts of the deceased, not even if they be the sons, grandsons or great-grandsons of the deceased (*j*). Compare with this sec. 288 above.

(*j*) *Abdul Rahman* v *Gajendhralal* (1933) 1 Cal. 132

CHAPTER XVI.

PARTITION AND RE-UNION.

MITAKSHARA LAW.

PROPERTY LIABLE TO PARTITION.

303. Subject of Partition.—The only property that can be divided on a partition is coparcenary property [s. 221]. Separate property cannot be the subject of partition [s. 222], nor can property which by custom descends to one member of the family to the exclusion of other members, *e.g.*, a Raj or principality (*k*). **S. 303**

Ancestral property.—It was thought at one time that a son could not enforce a partition of ancestral *moveables* against his father. But it is now established that a son is entitled to a partition of moveable (*l*) as well as of immoveable property against his father (*m*).

Property indivisible from its nature.—Where property is in its nature indivisible as, for instance, in the case of animals, furniture, etc., it may be sold and its value distributed; or it may be valued and retained by one coparcener exclusively and the amount credited to his share. In the case of a well, it may be enjoyed by the coparceners in turns or jointly (*n*). Where a strip of land is reserved as a common passage by a decree in a suit for partition for the use of the coparceners, none of them is entitled to a partition of that strip (*o*). Where a stock broker's card is issued by the Stock Brokers' Association in the name of a coparcener he must account for its value at the time of the partition (*p*).

Idols and places of worship.—Family idols and places of worship are not divisible [Manu, ch. ix, verse 219]. They may be held by the members by turns, or the Court may direct possession to be given to the senior member with liberty to the other members to have access to them for the purpose of worship (*q*). A *thakurbarhi* is not divisible (*r*). The High Court of Calcutta has recently hold that in the absence of any dedication of a

(*k*) *Ramalakshmi* v. *Sivanantha* (1872) 14 M. I. A. 570; *Chintamun* v. *Nowlukho* (1876) 1 Cal. 153, 2 I.A. 263; *Adrishappa* v. *Gurushidappa* (1880) 4 Bom. 494, 7 I.A. 162; *Kachi Kaliyana* v. *Kachi Yuva* (1905) 28 Mad. 508, 32 I.A. 261; *Bodhrao* v. *Nursing Rao* (1856) 6 M.I.A. 426.

(*l*) *Jugmohandas* v. *Mangaldas* (1886) 10 Bom. 528, 578; *Cassumbhoy* v. *Ahmedbhoy* (1888) 12 Bom. 280.

(*m*) *Suraj Bunsi Koer* v. *Sheo Persad* (1880) 5 Cal. 148, 165, 6 I.A. 88, 100.

(*n*) *Govind* v. *Trimbak* (1912) 36 Bom. 275, 6 I C. 521.

(*o*) *Shantaram* v. *Waman* (1923) 47 Bom 389, 68 I.C. 682, ('23) A.B. 85

(*p*) *Champaklal Chimanlal* v. *Sodagar Ambhai* (1945) Bom. 619.

(*q*) *Damodardas* v. *Uttamram* (1893) 17 Bom 271; *Mitta Kunth* v. *Neerunjun* (1875) 14 Beng. L R 166, *Pramatha Nath* v. *Pradyumna Kumar* (1925) 52 I.A. 245, 260, 52 Cal. 809, 826, 87 I.C. 305, ('25) A PC 139

(*r*) *Madanmohan* v. *Saha* (1930) 57 Cal. 570, 124 I. C. 327, ('30) A. C 173.

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building for the worship of the family idol, the building should not be excluded from partition merely because it is used for the worship of the idol. The Court may, however, in such a case give an option to a coparcener or coparceners willing to maintain the building as a place of worship to buy it at a valuation (*s*).

Right of way.—A right of way will be presumed to have remained joint, if there is no evidence that it was allotted to a particular member at the time of partition (*t*).

Share allotted on partition.—Where a coparcener, who is joint with his male issue separates from his father, brothers, or other coparceners, the property allotted to him at the partition is separate property as regards the divided members, but ancestral as regards his male issue [s. 223, sub-s. (*4*)]. Such property is, therefore, divisible as between him and his male issue, but the members who have already separated are not entitled to share in it. If he dies without leaving a male issue, it will descend to his heirs (*u*).

Separate property.—Coparcenary property alone is liable to partition. Separate property is not liable to partition at all; it belongs absolutely to the owner thereof. As to what is coparcenary property, see secs. 223, 227 and 228 above. As to what is separate property, see ss. 230-232 above.

Mode of allotment.—The principle of partition is that if property can be partitioned without destroying the intrinsic value of the whole property or of the shares, such partition ought to be made. If, on the contrary, no partition can be made without destroying the intrinsic value, then a money compensation should be given instead of the share which would fall to a coparcener by partition (*v*).

304. Property available for partition.—(*1*) In order to determine what property is available for partition, provision must first be made for joint family debts which are payable out of the joint family property, personal debts of the father not tainted with immorality (*w*), maintenance of dependent female members and of disqualified heirs, and for the marriage expenses of unmarried daughters (*x*). Where a partition takes place between the sons, provision must also be made for the funeral ceremonies of the widow (*y*) and mother of the last male-holder (*z*). After this is done, an account must be taken of the joint family property in the hands of the manager and other members of the family, according to the rule laid down in the next following section.

(*2*) *Marriage expenses, etc., after a suit for partition.*—As to the marriage expenses of *male* members of the family it has been held by the Judicial Committee (*a*), reversing a

(*s*) *Sachindra* v. *Hemchandra* (1931) 35 C.W.N. 151, 132 I.C. 688, ('31) A.C. 573; *Raj Coomari* v. *Gopal* (1878) 3 Cal. 514.

(*t*) *Nathubhai* v. *Bai Hansgavri* (1912) 36 Bom. 379, 15 I.C. 818.

(*u*) *Katama Natchiar* v. *The Rajah of Shivagunga* (1863) 9 M.I.A. 543; *Periasami* v. *Periasami* (1878) 1 Mad. 312, 5 I.A. 61.

(*v*) *Ashanullah* v. *Kali* (1884) 10 Cal. 675.

(*w*) *Venkureddi* v. *Venku Reddi* (1927) 50 Mad. 535, 100 I.C. 1018, ('27) A.M. 471.

(*x*) Strange's Hindu Law, vol. ii, p. 313; *Mussammat Bholi Bai* v. *Dwarka Das* (1924) 5 Lah. 375, 84 I.C. 168, ('25) A.L. 32; *Vaikuntam* V. *Kallapiran* (1900) 23 Mad. 512.

(*y*) See *Vaidyanath* v. *Aiyasamy* (1909) 32 Mad. 191, 200, 1 I.C. 408.

(*z*) *Nand Rani* v. *Krishna Sahai* (1935) 57 All. 997, 156 I.C. 23, ('35) A.A. 698.

(*a*) *Ramalinga* v. *Narayana* (1922) 49 I.A. 168, 45 Mad. 489, 68 I.C. 451, ('22) A.PC. 201; *Mussammat Bholi Bai* v. *Dwarka Das* (1924) 5 Lah. 375, 84 I.C. 168, ('25) A.L. 32; *Venkatarayudu* v. *Sivaramakrishnayya* (1935) 58 Mad. 126, 153 I.C. 368, ('34) A.M. 676.

decision of the Madras High Court (*b*), that since the *institution* of a suit for partition by a member of a joint family effects a severance of the joint status of the family, a male member of the family who is then unmarried is not entitled to have a provision made on partition for his marriage expenses, although he marries before the decree in the suit is made. S. 304

The case, however, of an unmarried daughter stands on a different footing. Her right to maintenance and marriage expenses out of the joint family property is in lieu of a share on partition; provision should accordingly be made for her marriage expenses in the decree. Thus if *A* has a son *S* and a daughter *D* by one wife, and a son *S*2 and a daughter *D*2 by another wife, and *S* brings a suit for partition, and *D*2 is married after the institution of the suit, one-third of her marriage expenses should be deducted out of his one-third share, and as regards one-third of the marriage expenses of *D* his one-third share in the property may be charged with such expenses. But *S* is not liable for the marriage expenses of his brother's (*S*2's) daughter, if any, she being the daughter of a collateral. Her marriage expenses should come out of her own father's share (*c*). The same rules apply to the expenses of betrothal ceremonies of daughters. As regards the expenses of the thread ceremony of the members of the family it has been held that provision should be made for them on partition (*d*).

As to marriage expenses *while the family is joint*, see s. 440 below.

Funeral ceremonies of the mother.—Under the Hindu Law, the *sons* are bound to perform *at their expense* the funeral ceremonies of their widowed mother even if she leaves *stridhana* and the *stridhana* descends to her daughters (*e*). If no provision is made for expenses of such ceremonies on a partition between the sons, then if one of the sons performs the ceremonies at his own expense, he is entitled to a contribution from his brothers (*f*).

Adverse possession.—It has been held by the High Court of Madras (*g*), dissenting from the High Court of Bombay (*h*), that possession, though exclusive, of a coparcener of a *portion* of the joint property for upwards of 12 years is not *adverse* against the other coparceners, if *all* the coparceners are in joint possession of the *rest* of the joint property. The other coparceners are therefore entitled to partition also of that portion of the property. As to exclusion from joint family, see sec. 235 (3a).

(*b*) *Narayana* v. *Ramalinga* (1916) 39 Mad. 587, 36 I.C. 428, ('17) A.M. 477.
(*c*) *Subbayya* v. *Ananta* (1930) 53 Mad. 84, 121 I.C. 113, ('29) A.M. 586.
(*d*) *Jairam* v. *Nathu* (1907) 31 Bom. 54.
(*e*) *Vrijbhukandas* v. *Bai Parvati* (1908) 32 Bom. 26.
(*f*) *Vaidyanatha* v. *Aiyasami* (1909) 32 Mad. 191, 200 I.C. 408. See Contract Act, ss. 69-70.
(*g*) *Kumarappa* v. *Saminatha* (1919) 42 Mad. 431, 52 I.C. 470, ('19) A.M. 531.
(*h*) *Vishnu* v. *Ganesh* (1897) 21 Bom. 325.

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Maintenance and marriage expenses.—Where a coparcener spends his own money for the maintenance of those persons whom the late proprietor was bound to maintain *e.g.*, his widow and daughters, and for the marriage expenses of the late owner's daughter he is entitled to payment on partition of the amount so spent by him (*i*).

305. Mode of taking accounts.—(*1*) No coparcener is entitled to call upon the manager to account for his *past* dealings with the joint family property, unless he establishes fraud, misappropriation or improper conversion [s. 238].

(*2*) No charge is to be made against any coparcener because a larger share of the joint income was spent on his family in consequence of his having a larger family to support (*j*). Similarly no credit is to be given to any coparcener because a smaller share of the income was spent on him and his family.

(*3*) A coparcener who is *entirely excluded* from the enjoyment of the family property is entitled to an account of the income derived from the family property, and to have his share of the income ascertained and paid to him, in other words he is entitled to what are called mesne profits (*k*). Mesne profits may also be allowed on partition where the family property or any part thereof has been held by a coparcener who claims it as his exclusive property (*l*), or where an arrangement has been made between the coparceners to enjoy the family property in specific and distinct shares, and the enjoyment of those shares is disturbed (*m*). Except in cases of this character, mesne profits are not recoverable in a suit for partition, and the partition must be made of *property as it exists at the time when partition was demanded* (*n*). One member is not in general entitled on partition to interest on money collected but not invested by another. Where one member had to pay more income-tax than was really due on behalf of the family by reason of his negligence he is not entitled to a credit for the excess amount (*o*).

Interest on mesne profits.—As to interest on mesne profits, see the undermentioned case (*p*).

(*i*) *Mussammat Bholi Bai* v. *Dwarka Das* (1924) 5 Lah. 375, 84 I.C. 168, ('25) A. L. 32.

(*j*) *Abhaychandra* v. *Pyari Mohan* (1870) 5 Beng. L.R. 347, 349.

(*k*) *Krishna* v. *Subbanna* (1884) 7 Mad. 564; *Venkata* v. *Narayya* (1879) 2 Mad. 128, 136-137, 7 I.A. 38, 51; *Venkata* v. *The Court of Wards* (1882) 5 Mad. 236, 9 I.A. 125. See Code of Civil Procedure, s. 2, c. (12) and O. 20, r. 12.

(*l*) *Bhivra* v. *Sitaram* (1895) 19 Bom. 532.

(*m*) *Shankar* v. *Hardeo* (1889) 16 Cal. 397, 16 I.A. 71.

(*n*) *Pirthi Pal* v. *Jowahir Singh* (1887) 14 Cal. 493, 14 I.A. 37; *Lakshman* v. *Ramchandra* (1876) 1 Bom. 561; *Konerrav* v. *Gurrav* (1881) 5 Bom. 589; *Jugmohandas* v. *Mangaldas* (1886) 10 Bom. 528, 28, 561; *Narayan* v. *Nathaji* (1904) 28 Bom. 201, 208; *Parmeshwar* v. *Gobind* (1916) 43 Cal. 459, 33 I.C. 190, ('16) A.C. 500; *Tammireddi* v. *Gangireddi* (1922) 45 Mad. 281, 70 I.C. 337, ('22) A.M. 236.

(*o*) *Yasobadra Nainar* v. *Samanthabadran* (1936) 59 Mad. 154, 160 I.C. 602, ('36) A.M. 12).

(*p*) *Ramasamy* v. *Subramania* (1923) 46 Mad. 47, 74 I.C. 804, ('23) A.M. 147.

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II.—PERSONS ENTITLED TO A SHARE ON PARTITION.

306. Persons entitled to a share.—Every coparcener is entitled to a *share* upon partition (*q*). But every coparcener has not an unqualified right *to enforce or sue for* a partition [see ss. 307-308].

307. Sons, grandsons and great-grandsons.—Every adult coparcener is entitled to demand and sue for partition of the coparcenary property at any time.

In Bombay it has been held that without the assent of his father a son is not entitled to a partition if the father is *joint* with his own father, brothers, or other coparceners, through he may enforce a partition against the father if the father is *separate* from them (*r*). The other High Courts do not recognize any such exception (*s*).

Illustrations.

(a) If a joint family consists of a father and sons, the sons can enforce a partition of the joint family property against the father (*t*). Similarly, if a joint family consists of a grandfather and grandsons, the grandsons can enforce a partition against the grandfather (*u*). Likewise, if a joint family consists of a great-grandfather and great-grandsons, the great-grandsons can enforce a partition against the great-grandfather (*v*). Thus far there is no difference of opinion between the various High Courts.

(b) A joint Hindu family consists of *A*, *B* and *C*, *A* being *C*'s grandfather, and *B* being *C*'s father. *C* sues *A* and *B* for a partition of the joint family property. Is *C* entitled to a partition? According to the Bombay High Court he is not, unless his father (*B*) consents to the partition. In the view taken by that Court, the father *obstructs* the son's right to a partition. According to the other High Courts, *C*, taking as he does a vested interest in the ancestral property by birth, can compel a partition even during the life-time of his father [*B*].

A
|
B
|
C

(c) A joint family consists of *A*, *B* and *C*, *A* being *C*'s father and *B* being *C*'s uncle. *C* sues *A* and *B* for partition. Is *C* entitled to a partition? According to the Bombay High Court, he is not, unless his father (*A*) consents to a partition. According to the other High Courts, he is.

A B
|
C

The conflict of decisions referred to above has arisen from different readings of the same text of the Mitakshara; see Mitakshara, chapter I, section 5, verse 3.

In *Sartaj* v. *Deoraj* (*w*), their Lordships of the Privy Council said: "The property in the paternal or ancestral estate acquired by birth under the Mitakshara law is, in

(*q*) *Sartaj Kuari* v. *Deoraj Kuari* (1888) 10 All. 272, 287, 15 I.A. 51, 64.

(*r*) *Apaji* v. *Ramchandra* (1892) 16 Bom. 29 [Telang, J., dissenting]; *Rai Bischenchand* v. *Asmaida Koer* (1884) 6 All. 560, 574, 11 I.A. 164, 179; *Jivabhai* v. *Vadilal* (1905) 7 Bom. L.R. 232 [a case under the Mayukha].

(*s*) *Jogul Kishore* v. *Shib Sahai* (1883) 5 All. 430 [F.B.] [Stuart, C.J., dissenting]; *Rameshwar* v. *Lachmi* (1904) 31 Cal. 111, 128-129; *Subba* v. *Ganasa* (1895) 18 Mad. 179, 183; *Digambar* v. *Dhanraj* (1922) 1 Pat. 361, 67 I.C. 156, ('22) A.P. 96

(*t*) *Suraj Bunsi Koer* v. *Sheo Proshad* (1879) 5 Cal. 148, 165, 6 I A. 88, 100; *Jugmohandas* v. *Mangaldas* (1886) 10 Bom. 528; *Kali Parshad* v. *Ram Charan* (1876) 1 All. 159 [F.B.].

(*u*) *Nagalinga* v. *Subbramaniya* (1862) 1 Mad. H.C. 77; *Laljeet* v. *Rajcoomar* (1874) 12 Beng. L R. 373.

(*v*) West and Buhler, 4th ed, p 622.

(*w*) (1888) 10 All. 272, 287, 15 I.A 51, 64.

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their Lordships' opinion, *so connected with the right to a partition*, that it does not exist where there is no right to it."

Khojas.—The only branch of Hindu law which applies to Khojas is the law relating to succession and inheritance. This branch of the Hindu law is applied to Khojas on the ground of *custom*. No other branch of the Hindu law can be applied to Khojas unless it be shown that it is recognized among them by custom. Thus if a Khoja son claims *partition* of ancestral property against his father, he must prove that there is a custom among Khojas recognizing the right of a son to claim partition against his father. Such a custom was set up in *Ahmedbhoy* v. *Cassumbhoy* (*x*), but the Court held that there was no evidence in support of it and the suit brought by the son was dismissed. See notes to sec. 582.

The Punjab.—See *Hari Kishan* v. *Chandu Lal* (1917) Punj. Rec. No. 105, p. 408, ('18) A.L. 291 [F.B.].

308. Minor coparceners.—(*1*) Where a suit is brought on behalf of a minor coparcener for partition, the Court should not pass a decree for partition, unless the partition is likely to be for the benefit of the minor by advancing his interests or protecting them from danger (*y*).

Where an adult coparcener in possession of the family property is wasting the property, or sets up an exclusive title in himself, or otherwise denies the minor's rights, or declines to provide for the minor's maintenance, it is in the minor's interest that the family property should be partitioned, and the minor's share set apart and secured for him (*y*). But if there be nothing to show that the partition would be for the benefit of the minor, the Court should refuse to direct partition (*z*). The reason is that generally speaking "the family estate is better managed and yields a greater ratio of profit in union than when split up and distributed among the several coparceners;" moreover the minor would as the result of a partition lose the benefit of survivorship which he might obtain if the family continued joint (*a*).

(*2*) But though a *suit* cannot be brought for partition on behalf of a minor except in the cases mentioned above, the minority of a coparcener is no bar to a partition between the coparceners. A partition by agreement, though entered into during the minority of a coparcener, is binding on the minor, *unless it is unfair or prejudicial to his interests*. If the partition is unfair or prejudicial to the minor's interests,

(*x*) (1889) 13 Bom. 534.

(*y*) *Mahadev* v. *Lakshman* (1895) 19 Bom. 99 [maintenance refused]; *Bholanath* v. *Ghasi Ram* (1907) 29 All. 373 [suit against father]; *Thangam* v. *Suppa* (1889) 12 Mad. 401; *Kamakshi* v. *Chidambara* (1866) 3 Mad. H.C. 94; *Damoodur* v. *Senabutty* (1882) 8 Cal. 537.

(*z*) *Bachoo* v. *Mankorebai* (1905) 29 Bom. 51-60, affirmed on appeal (1907) 31 Bom. 373, 379, 34 I.A. 107 [suit by a posthumous son against an adopted son—partition refused].

(*a*) (1866) 3 Mad. H.C. 94, 96, 98, *supra*.

the minor may, on attaining majority, have it set aside by proper proceedings so far as regards himself. He may also, on attaining majority, enforce the agreement by suit, and it is no answer to the suit that he was not a party to the agreement (*b*). Where the family consists of an adult and a minor, the adult coparcener can put an end to the joint status by his conduct and declaration (*c*). **Ss. 308, 309**

Sub-section (1)—The view taken in some of the earlier cases that a minor can sue for partition only in cases of waste is no longer tenable. The law now is that a minor can sue for partition not only in a case of waste, but also where the circumstances are such as would render it *for his benefit* that his share should be divided off and secured.

Sub-section (2)—In *Balkishen Das* v. *Ramnarain* (*d*), their Lordships of the Privy Council said: "There is no doubt that a valid agreement for partition may be made during the minority of one or more of the coparceners. That seems to follow from the admitted right of one coparcener to claim a partition, and if an agreement for partition could not be made binding on minors a partition could hardly ever take place."

Institution of a suit for partition by minor, whether operates as a partition.—See s. 325 (*1*) (ii).

309. Son begotten at time of partition, but born after partition. A son, who was in his mother's womb at the time of partition, is entitled to a share though born after partition, as if he was in existence at the time of partition. If no share is reserved for him at the time of partition, he is entitled to have the partition re-opened and share allotted to him (*e*).

Illustrations.

(a) *A* and his two sons *B* and *C* are members of a joint Hindu family. The father and sons propose to divide the joint family property. *A*'s wife, *X*, is pregnant at the time, and the pregnancy is known to the family. In such a case, the property should be divided into five parts, of which *A*, *B*, *C* and *X* will each take one part, and the fifth part should be set apart to abide the event, so that if a son is born, it may be allotted to him, and if a daughter is born, it may be divided again between *A*, *B*, *C* and *X*.

(b) *A* and his son *B* are members of a joint family. The father and son divide the joint property between themselves, each taking one-half. Five months after the partition a son *C* is born to *A*. The partition should be re-opened and the property should be divided into three parts, each member taking one-third.

After-born sons.—A son born after partition may have been begotten either *at the time of partition* or *subsequent to the partition.* The present section deals with the former case; the next section deals with the latter case. As to the rights of a son in his mother's womb, see notes to sec. 270 at p. 328 above.

(*b*) *Balkishen Das* v. *Ramnarain* (1903) 30 Cal. 738, 30 I.A. 139 [agreement held to be fair]; *Chanvirappa* v. *Danava* (1895) 19 Bom. 593 [ditto]; *Awadh* v. *Sitaram* (1907) 29 All. 37 [agreement enforced at suit of minor]; *Lal Bahadur* v. *Sispal* (1892) 14 All. 498 [where the full share of the minor was not assigned to him]; *Krishnabai* v. *Khangouda* (1894) 18 Bom. 197 [where no share was reserved for the minor at all]

(*c*) *Dnyaneshwar Krishna* v. *Ananta Vasudeo* (1936) 60 Bom. 736, 38 Bom. L.R. 579, 164 I.C. 632, ('36) A B. 290.

(*d*) (1903) 30 Cal. 738, 752, 30 I.A. 139, 150.

(*e*) *Yekeyamian* v. *Agniswarian* (1870) 4 Mad. H.C. 307; *Kalidas* v. *Krishan* (1869) 2 Beng L.R. [F.B.] 103, 118-121; *Hanmant* v. *Bhimacharya* (1888) 12 Bom. 105, 108-109.

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310. Son begotten as well as born after partition.—A father separating from his sons may or may not reserve to himself a share on partition. The rights of a son born as well as begotten after partition are different according as the father has or has not reserved a share to himself.

(1) Where the father *has reserved* a share to himself, a son who is begotten as well as born after partition is not entitled to have the partition re-opened; but in lieu thereof he is entitled, after the father's death to inherit not only the share allotted to the father on partition, but the whole of the separate property of the father, whether acquired by him before or after partition, to the entire exclusion of the separated sons (*f*). Thus if *A* has three sons *B*, *C* and *D*, and he *separates from them all*, reserving one-fourth share to himself, and a son *F* is born to *A* three years after the partition, *F* will take on *A*'s death the one-fourth share allotted to *A* at the partition and also the whole of *A*'s separate property to the entire exclusion of *B*, *C* and *D*. If *A* has dissipated his share, and leaves no property, *F* takes nothing (*g*). Next, suppose, that *A* does not separate from all the three sons, but separates from *B* alone and remains joint with *C* and *D*, and *F* is subsequently born to *A*. In this case *C*, *D* and *F* will, on *A*'s death, all take in equal shares the portion of the joint property allotted to *A*, *C* and *D* at the partition, and also *A*'s separate property; that is to say, the separate property of *A* and the portion of the joint family property allotted to *A*, *C* and *D* at the partition will be divided equally among *C*, *D* and the after-born son *F* (*h*). The same principle applies if *A* separates from *B* and *C*, and remains joint with *D*, and *F* is subsequently born to *A*.

(2) Where the father *has not reserved* a share to himself on a partition with his sons, a son who is born as well as begotten after the partition is entitled to have the partition re-opened and to have a share allotted to him not only in the property as it stood at the time of the original partition, but in the accumulations made with the help of that property (*i*). Where at a partition between a father, his son by the first wife and two

(*f*) *Kalidas* v. *Krishan* (1869) 2 Beng. L. R. F. B. 103, 118-121; *Nawal Singh* v. *Bhagwan Singh* (1882) 4 All. 427.

(*g*) *Shivajirao* v. *Vasantrao* (1919) 13 Bom. 267, 272, 2 I.C. 294.

(*h*) *Ganpat* v. *Gopalrao* (1899) 23 Bom. 636. See this case criticised in Ghose's Hindu Law, 3rd ed., pp. 572-573. See also *Fakirappa* v. *Yellappa* (1898) 22 Bom. 101; *Nana* v. *Ramchandra* (1909) 32 Mad. 377, 2 I.C. 519.

(*i*) *Chengama* v. *Munisami* (1897) 20 Mad. 75

sons by the second wife a small item was allowed to the father for maintenance, with a clause that an after-born son should be provided out of the share allotted to his mother and full brothers, it was held that the right of the after-born son to reopen the partition was not affected by the clause (*j*).

311. Adopted son.—As to the share of an adopted son in a partition :—

(1) between him and after-born natural sons of his adoptive father, see sec. 497 ;

(2) between him and other coparceners, see sec. 499 (*2*).

312. Illegitimate son.—(*1*) An illegitimate son of a Hindu may be a son by concubine who is a *dasi*, or he may be a son by a concubine who is not a *dasi*. A *dasi* is a concubine who is in the exclusive and continuous keeping of a Hindu. An illegitimate son of a Hindu by a *dasi* is called *dasiputra* (*k*). We are here concerned only with a *dasiputra*.

(*2*) Illegitimate sons of the three regenerate classes [s. 1] are not entitled to inheritance or to any share on partition; they are entitled to maintenance only (*l*). This proposition is founded on the Mitakshara, ch. I, s. 12, para. 3.

(*3*) Illegitimate sons of Sudras are entitled to certain rights of inheritance and partition. The text of the Mitakshara bearing on the subject is as follows :—

"The son begotten by a Sudra of a female slave [*dasiputra*] obtains a share by the father's choice or at his pleasure. But after [the demise of] the father, if there be sons of a wedded wife, let these brothers allow the son of the female slave to participate *for half a share* ; that is let them give him half [as much as is the amount of one brother's] allotment : " Mitakshara, chap. i, sec. 12, para. 2.

A Sudra father may be joint with his collaterals or he may be separate from them. The above text refers to the estate of a separated householder (*m*).

The following propositions are well established :—

(1) The illegitimate son of a Sudra does not acquire by birth any interest in his father's estate. He cannot therefore enforce a partition against his father in his life-time (*n*). But

(*j*) *Athlinga Gounder* v. *Ramaswami Gounder* (1945) Mad. 297.

(*k*) *Rahi* v. *Govind* (1876) 1 Bom. 97, 110 ; *Sadu* v. *Baiza* (1880) 4 Bom. 37 [F.B.] ; *Krishnayyan* v. *Muttusami* (1884) 7 Mad. 407, 412 ; *Brindavana* v. *Radhamani* (1889) 12 Mad. 72, 86 ; *Soundarajan* v. *Arunachalam* (1916) 39 Mad. 136, 33 I.C. 858, ('16) A.M. 1170 ; *Sarasuti* v. *Mannu* (1879) 2 All. 134 ; *Hargobind* v. *Dharam Singh* (1884) 6 All. 329 ; *Rajani Nath Das* v. *Nitai Chandra Dey* (1921) 48 Cal. 643, 63 I.C. 50, ('21) A. C. 820 [F.B.].

(*l*) *Roshan Singh* v. *Balwant Singh* (1900) 22 All. 191, 27 I.A. 51 ; *Chuoturya* v. *Sahub Purhulad* (1857) 7 M. I. A. 18.

(*m*) *Ranoji* v. *Kandoji* (1885) 8 Mad. 557, 561.

(*n*) *Raja Jogendra* v. *Nityanand* (1891) 18 Cal. 151, 155, 17 I.A. 128 ; (1880) 4 Bom. 37, 44-45, *supra*.

Ss. 312-314

the father may, in his lifetime, give him a share of his property, even a share equal to that of a legitimate son (*o*). The gift by the father of some property, describing it as his self-acquired property, for maintenance, does not separate the illegitimate sons in respect of the joint family property (*p*).

(2) On the father's death, however, he succeeds to his estate as a coparcener with the legitimate son of his father, with a right of survivorship, and he is entitled to enforce a partition against the legitimate son. On a partition between an illegitimate and a legitimate son, the illegitimate son takes only one-half of what he would have taken if he were legitimate, that is, the illegitimate son takes one-fourth, and the legitimate son takes three-fourth (*q*). If either of them dies before partition, the survivor takes the whole estate (*r*).

(3) If the father was joint at his death with his collaterals, *e.g.*, his brothers or their sons, or his uncles or his sons, the illegitimate son is not entitled to demand a partition of the joint family property, but he is entitled as a member of the family to maintenance out of such property, provided his father left no separate estate (*s*).

See notes to sec. 43, nos. 1-3, "Illegitimate sons."

313. Absent coparcener.—An absent coparcener stands on the same footing as a minor, and his right to receive a share extends to his descendants (*t*).

The right of the descendants, however, would be subject to the law of limitation: see the Indian Limitation Act, 1908, Sch. 1, arts. 127 and 144.

314. Purchaser.—A purchaser of the undivided interest of a coparcener *at a sale in execution of a decree* can demand partition according to all schools. A purchaser of the interest of a coparcener *by private contract* can claim partition in Bombay and Madras, but not in Bengal or the United Provinces. The reason is that according to the Mitakshara law as interpreted in Bengal and the United Provinces, a coparcener cannot sell his interest in the coparcenary property

(*o*) *Karuppanna* v. *Bulokam* (1900) 23 Mad. 16; *Packiriswamy* v. *Doraswamy* (1931) 9 Rang. 266, 132 I.C. 817, ('31) A.R. 216.

(*p*) *Sakharam Satu* v. *Shamrao* (1932) 34 Bom. L R. 191, 137 I.C. 572, ('32) A.B. 234.

(*q*) *Kamulammal* v. *Visvananthaswami* (1923) 50 I.A. 32, 46 Mad. 167, 71 I.C. 643, ('23) A PC. 8.

(*r*) *Raja Jogendra* v. *Nityanand* (1891) 18 Cal. 151, 17 I.A. 128.

(*s*) *Vellaiyappa Chetty* v. *Natarajan* (1932) 55 Mad. 1, 58 I.A. 402, 134 I.C. 1084, ('31) A.PC. 294; *Ranoji* v. *Kandoji* (1885) 8 Mad. 557, *Sadu* v. *Baiza* (1880) 4 Bom. 37, 44-45 [F.B.], *Thangam* v. *Suppa* (1889) 12 Mad. 401; *Karuppa* v. *Kumarasami* (1902) 25 Mad. 429; *Gopalaswami* v. *Arunachellam* (1904) 27 Mad. 32; *Parvathi* v. *Thirumalai* (1887) 10 Mad. 334.

(*t*) Strange's Hindu Law, vol. i, p. 206; vol. ii, p. 341.

without the consent of the other coparceners [ss. 260 and 261].

A gift or *devise* by a coparcener of his undivided interest is void according to the Mitakshara law as applied in *all* the provinces [s. 258]. Therefore, a *donee* or a *devisee* of an undivided interest cannot sue for partition (*u*).

315. Wife.—(*1*) A wife cannot herself demand a partition (*v*), but if a partition does take place between her husband and his sons, she is entitled to receive a share equal to that of a son and to hold and enjoy that share separately even from her husband (*w*). Where at a partition between a father and his three sons, the wife was not allotted a share, it was held that she was entitled to reopen the partition, there being no waiver merely by her not asking for a share but that in the partition the value of the ornaments taken by her must be taken into account (*x*). Where a son institutes a suit for the partition of joint family property impleading his mother and other members of the family as defendants and a preliminary decree is passed, the mother does not become owner of the share allotted to her until the preliminary decree is carried out and there is a division by metes and bounds. Therefore a mortgagee suing on a mortgage before the property is actually divided can obtain a valid mortgage decree without impleding the mother (*y*).

(*2*) The expression "wife" in relation to "sons" includes their step-mother (*z*).

(*3*) If the wife has *stridhana* given to her by her husband or father-in-law, its value should be deducted from her share (*a*).

(*4*) The above rules also apply when a father himself makes a partition of ancestral property among his sons [s. 325].

Illustrations.

(a) *A* has two wives *B* and *C*, a son *D* by *B*, and four sons by *C*. *D* sues his father *A* for partition. Each of these eight persons is entitled to a one-eighth share including *B* and *C*: *Dular Koeri* v. *Dwarkanath* (1905) 32 Cal. 234. [See as to mother, s. 316, below].

(*u*) *Baba* v. *Timma* (1884) 7 Mad. 357 [F.B.].

(*v*) *Punna Bibee* v. *Radha Kissen* (1904) 31 Cal. 476.

(*w*) *Dular Koeri* v. *Dwarkanath* (1905) 32 Cal. 234 [suit for partition by son against father]; *Jairam* v. *Nathu* (1907) 31 Bom. 54 [ditto]; *Sumrun* v. *Chunder Mun* (1882) 8 Cal. 17; *Partap Singh* v. *Dalip Singh* (1930) 52 All. 596, 125 I.C. 762, ('30) A.A. 537; *Dhanabathi Bibi* v. *Pratapmull Agarwalla* (1934) 61 Cal. 1056, 154 I.C. 655, ('35) A.C. 131.

(*x*) *Radhabai* v. *Pandharinath* (1912) Nag. 554, 194 I.C. 724, ('41) A.N. 135.

(*y*) *Pratapmull Agarwalla* v. *Dhanabati Bibi* (1936) 63 I.A. 33, 63 Cal. 691, 38 Bom. L.R. 323, 159 I.C. 1080, ('36) A.PC. 20.

(*z*) (1907) 31 Bom. 54 [Mayukha], *supra*; *Hosbanna* v. *Devanna* (1924) 48 Bom. 468, 80 I.C. 468, ('24) A. B. 444 [Mitakshara].

(*a*) (1907) 31 Bom. 54, *supra*.

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(b) *A* has a wife *B*, two sons by *B*, and a son *C* by a predeceased wife. *C* sues his father *A* for partition. Each of these five persons is entitled to a one-fifth share including *B* : *Jairam* v. *Nathu* (1907) 31 Bom 54.

Madras Presidency.—In Southern India the practice of allotting shares upon partition to females has long since become obsolete (*b*). See Strange's Hindu Law, 5th ed., p. 178, f.n. (a) and Macnaghten's Hindu Law, 3rd ed., p. 50.

Putrabhaga.—When the division is by number of *sons* it is called *putrabhaga* : when the division is according to *wives*, it is known as *patnibhaga*. *Putrabhaga* is now the recognized mode of division. But the custom of *patnibhaga* prevails in some places and in some families especially among *Sudras* (*c*).

Whether a share allotted to a wife on partition is her stridhana ?—The share allotted to a wife (which expression includes step-mother) on partition is not her stridhana unless it be shown that it was given to her absolutely [s. 128].

The present section deals with the rights of a female who occupies the position of a *wife*. The next section deals with the rights of the same female after her husband's death, that is, a female who has become a *widow*, and occupies the position of a *mata*, that is, *mother* or *step-mother*, towards the sons of her deceased husband.

316. Widow-mother.—(*1*) A mother cannot compel a partition so long as the sons remain united. But if a partition takes place between the sons, she is entitled to a share equal to that of a son in the coparcenary property (*d*). She is also entitled to a similar share on a partition between the sons and the purchaser of the interest of one or more of them (*e*). Where a son sues for partition but dies during the pendency of the suit and the mother was brought in as the legal representative she is entitled only to his share and not to a mother's share (*f*). See sec. 35.

(*2*) If the mother has received stridhana from her husband or father-in-law, its value should be deducted from her share (*g*).

(*3*) The term "mother" in this section includes step-mother (*h*).

(*4*) On a partition between sons by different mothers when more than one mother is alive, the rule is first to divide the property into as many shares as there are sons, and then to allot to each surviving mother a share equal to that of each of her sons in the aggregate portion allotted to them (*i*).

(*b*) *Subramanian* v. *Arunachelam* (1905) 28 Mad. 1, 8.

(*c*) *Palaniappa* v. *Alayyan* (1921) 48 I.A. 539, 44 Mad. 740, 64 I.C. 439, ('22) A.PC. 228.

(*d*) *Damoodur* v. *Senabutty* (1882) 8 Cal. 537 ; *Damoodardas* v. *Uttamram* (1893) 17 Bom. 271 ; *Chowdhry Ganesh Dutt* v. *Jewach* (1904) 31 Cal. 262, 271, 31 I A. 10, 15 ; *Isree Pershad* v. *Nasib Koer* (1884) 10 Cal. 1017 [alleged waiver of right to partition].

(*e*) *Bilaso* v. *Dina Nath* (1881) 3 All. 88 ; *Amrita Lall* v. *Manick Lall* (1900) 27 Cal 551 , *Jogendra* v. *Fulkumari* (1900) 27 Cal. 77 [judgment rested on the Dayabhaga].

(*f*) *Parbatidevi* v. *Bansidhar* (1943) All. 810, ('43) A.A. 350.

(*g*) *Kishori* v. *Moni Mohun* (1886) 12 Cal. 165 ; *Judoo Nath* v. *Brojonath* (1874) 12 Beng. L.R. 385.

(*h*) *Damoodur* v. *Senabutty* (1882) 8 Cal. 537 ; *Damodardas* v. *Uttamram* (1893) 17 Bom. 271, 286-287 ; *Har Narain* v. *Bishambhar* (1916) 38 All. 83, 31 I.C. 907, ('15) A.A. 340 ; *Tegh Indar* v. *Harnam* (1925) 6 Lah. 457, 90 I.C. 1035, ('25) A.L. 568 ; *Saheb Rai* v. *Shafiq Ahmad* (1927) 31 C.W.N. 972, 101 I.C. 426, ('27) A.PC. 101.

(*i*) *Kristo Bhabiney* v. *Ashutosh* (1886) 13 Cal. 39.

Ss. 316, 317

Illustrations.

(a) *A* dies leaving a widow *B*, three sons by *B*, and a son *X* by a predeceased wife. *X* sues his step-mother *B* and his three half-brothers for a partition. The property will be divided into 5 parts, each of the 5 persons above-named including *B* taking one-fifth: *Damodardas* v. *Uttamram* (1893) 17 Bom. 271.

(b) *A* dies leaving two widows, *B* and *C*, two sons by *B*, and three sons by *C*. On a partition between the sons of *B* and *C*, the mode of division is first to divide the property into 5 shares corresponding to the number of sons. The two sons of *B* will share 2/5 equally with their mother *B*, each taking 1/3 of 2/5, *i.e.*, 2/15. The three sons of *C* will share 3/5 equally with their mother *C*, each taking 1/4 of 3/5, *i.e.*, 3/20. Thus *B* will take 2/15, and *C* will take 3/20.

(c) *A* dies leaving two widows *B* and *C*, and two sons *D* and *E* by *B*. *C* has no son. *D* sues *E*, *B* and *C* for partition. The property will be divided into 4 parts, there being 2 widows and 2 sons, and each widow will take one-fourth and each son also will take one-fourth. The fact that *C* has no son does not affect her right to a share: See *Damoodur* v. *Senabutty* (1882) 8 Cal. 537.

Partition between legitimate and illegitimate sons of a Sudra.—Among Sudras, a mother is entitled to a share on a partition between her sons and the illegitimate sons of her husband (*j*).

Madras Presidency.—In Madras a mother is not entitled to a share. She is entitled only to a provision for her maintenance which must not in any case exceed the share of a son (*k*): Smriti Chandrika, chap. iv, paras. 12-17. See also notes to sec. 315.

Whether the share allotted to a mother on partition is her stridhana.—See sec. 128 above.

Omission to reserve a share for the mother.—The omission to reserve a share for the mother does not render the partition invalid (*l*).

Sale of one of the properties before decree in a partition suit.—See sec. 353 (7).

317. Grandmother.—(*1*) A paternal grandmother (father's mother) cannot herself demand a partition, but when a partition takes place *between her sons' sons, her own sons being dead*, she is entitled to a share equal to that of a son's son (*m*). She is similarly entitled to a share when a partition takes place between her son and the sons of a *deceased* son (*n*). But when partition takes place between her son and his sons, it has been held by the High Courts of Allahabad (*o*) and Bombay (*p*) that she is not so entitled; and by the High Courts of Calcutta (*q*) and Patna (*r*) that she is; the last decision proceeds on a text of Vyasa which allows her a share on such a partition. But now see sec. 35 and notes to secs. 43 and 316.

(*j*) *Manchharam* v. *Dattu* (1920) 44 Bom. 166, 54 I.C. 110, ('20) A.B. 241.

(*k*) *Venkatammal* v. *Andyappa* (1883) 6 Mad. 130.

(*l*) *Chowdhry Ganesh Dutt* v. *Jewach* (1904) 31 Cal. 262, 271, 31 I.A. 10, 15.

(*m*) *Kanhaiya Lal* v. *Gaura* (1925) 47 All. 127, 83 I.C. 47, ('25) A.A. 19; *Vithal* v. *Prahlad* (1915) 39 Bom. 373, 28 I.C. 967, ('15) A.B. 35.

(*n*) *Babuna* v. *Jagat Narain* (1928) 50 All. 532, 109 I.C. 61, ('28) A.A. 330.

(*o*) *Sheo Narain* v. *Janki Prasad* (1912) 34 All. 505, 16 I.C. 88.

(*p*) *Jamnabai* v. *Vasudeo* (1930) 54 Bom. 417, 124 I.C. 793, ('30) A.B. 302; *Jotiram Ekoba* v. *Ramachandra Trimbak* (1941) Bom. 638, 197 I.C. 788, ('41) A.B. 382.

(*q*) *Badri Roy* v. *Bhugwat* (1882) 8 Cal. 649.

(*r*) *Krishna Lal* v. *Nandeshwari* (1919) 4 Pat. L. J. 38, 42-44, 44 I.C. 146, ('18) A.P. 91.

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(2) The expression "grandmother" in this section includes step-grandmother (*s*).

Illustration.

A has a son *B*, a mother *M*, and two wives *W* and *W*1. *B* sues *A* for partition. Under the Dayabhaga law, each of these five persons would be entitled to 1/5. Under the Mitakshara law, *M* would not be entitled to a share and each of the other persons would take 1/4.

Whether the share allotted to a grandmother on portition is her stridhana?—See s. 128 above.

No female except those mentioned in ss. 315 to 317 is entitled to a share on partition. Thus daughters, sisters, etc., are not entitled to a share on partition. But on a partition provision must be made for their maintenance and marriage expenses: see s. 304.

318. Disqualified coparceners.—Persons who by Hindu law are disqualified by physical infirmity from inheriting are also disentitled to a share on partition. This subject is dealt with in sections 106 to 109.

III.—RESTRAINT AGAINST PARTITIONS.

319. Agreement not to partition.—It has been held by the High Courts of Calcutta (*t*), and Allahabad (*u*), that an agreement between coparceners not to partition coparcenary property binds the actual parties thereto, but it does not bind their assigns, unless there be a stipulation not to assign. A compromise followed by a decree providing that certain properties should be divided and certain other items should be kept joint for ever, was held to be enforceable in law (*v*). On the other hand, it has been held by the High Court of Bombay that such an agreement does not bind even the parties thereto, so that any party may, notwithstanding the agreement, sue the other parties for a partition (*w*). A similar view has been taken in Madras (*x*).

Illustration.

Calcutta decisions.—*A* and *B*, two Hindu brothers, agree not to partition the coparcenary property. After the date of the agreement, *A* sells his interest in the joint property to *P*. The agreement is not binding upon *P*, there being no stipulation not to assign. *P* may, therefore, sue *B* for partition.

See the Transfer of Property Act, 1882, ss. 10-41.

(*s*) *Vithal* v. *Prahlad* (1915) 39 Bom. 373, 28 I.C. 967, ('15) A. B. 35; *Sriram* v. *Haricharan* (1930) 9 Pat. 338, 125 I.C. 518, ('30) A.P. 315.

(*t*) *Anand Chandra* v. *Pran Kisto* (1869) 3 Beng. L.R.O.C. 14; *Anath Nath* v. *Mackintosh* (1871) 8 Beng. L. R. 60; *Rajender* v. *Sham Chund* (1881) 6 Cal. 106; *Srimohon* v. *Macgregor* (1901) 28 Cal. 769, 786; *Krishendra* v. *Debendra* (1908) 12 C. W. N. 798.

(*u*) *Rup Singh* v. *Bhubhuti* (1920) 42 All. 30, 58 I.C. 632, ('20) A. A. 341.

(*v*) *Jyotish Chandra Narayan* v. *Rathika Chandra Narayan* (1933) 60 Cal. 1078, 149 I.C. 150, ('33) A.C. 892.

(*w*) *Ram'inga* v. *Virupakshi* (1883) 7 Bom. 538.

(*x*) *Arumugha Chetty* v. *Ranganathan Chetty* (1934) 57 Mad. 405, 146 I.C. 1057, ('33) A.M. 847.

It is open to Hindu brothers to divide the family property and to agree that upon the death of any one of them *without male issue* his share shall pass to the surviving brothers. Such an agreement is not in contravention of the provisions of Hindu law (*y*). But it is not open to the contracting parties to lay down a rule of inheritance for the property in the hands of the last survivor in derogation from the ordinary rules of Hindu law (*z*).

320. Direction in a will prohibiting partition.—A direction in a will prohibiting a partition, or postponing a partition for an indefinite period, is invalid (*a*).

See the Indian Succession Act, 1925, ss. 77 and 183.

IV.—ALLOTMENT OF SHARES.

321. Shares on partition.—On a partition between the members of a joint family, shares are allotted according to the following rules :—

1. On a partition between a father and his sons each son takes a share equal to that of the father. Thus if a joint family consists of a father and three sons, the property will be divided into four parts, each of the four members taking one-fourth.

2. Where a joint family consists of brothers, they take equal shares on a partition.

3. Each branch takes *per stirpes* (that is, according to the stock) as regards every other branch, but the members of each branch take *per capita* as regards each other. This rule applies equally whether the sons are all by the same wife or by different wives [ills. (a) and (b)].

It has been laid down by the High Court of Madras following the authority of the Smriti Chandrika, that rule 3 applies to cases in which *all* the coparceners desire partition at the same time. In cases in which only some of the members of a joint family separate from it at one time and others on a subsequent occasion, regard should be had to the shares allotted at the first partition in computing the shares to be allotted at the second partition (*b*). On the other hand, it has been laid down by the High Court of Bombay, following the authority of the Vyavahara Mayukha, that in allotting shares at the second partition, regard is to be had to the state of the family at the time of the second partition, and not to the state of the family

(*y*) *Kanti* v. *Al-i-Nabi* (1911) 33 All. 414, 9 I.C 935; *Ram Nirunjun* v. *Prayag Singh* (1882) 8 Cal. 138.

(*z*) *Bageshar Rai* v. *Mahadevi* (1924) 46 All. 525, 79 I.C. 514, ('24) A.A. 401.

(*a*) *Mokoondo* v. *Gonesh Chunder* (1876) 1 Cal. 104; *Raikishori* v. *Debendranath* (1888) 15 Cal 409, 15 I.A. 37; *Poorendra Nath* v. *Hemangini* (1909) 36 Cal. 75, at p. 77, 1 I.C 523.

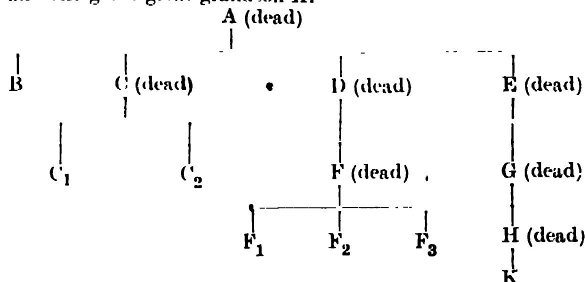
(*b*) *Manjanatha* v. *Narayana* (1882) 5 Mad. 362; *Narayana* v. *Shankar* (1930) 53 Mad. 1, 121 I.C. 1, ('29) A.M. 865 [F.B.].

S. 321 at the first partition (c). The ordinary rule is that partition should be made *rebus sic stantibus* as on the date of the suit, *i.e.*, according to the condition of the family as on the date of the suit. According to the Madras High Court, this rule is to be applied at the first partition only, and not at the second partition. According to the Bombay High Court, the rule is to be applied at both partitions [see ills. (c) and (d)].

4. On the death of a coparcener leaving male issue, his right to a share on partition is represented by his male issue, that is it passes to his male issue, provided such issue be within the limits of the coparcenary.

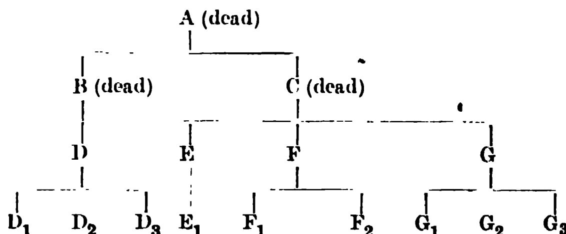
Illustrations.

(a) *A* dies leaving a son *B*, two grandsons C_1 and C_2, three great-grandsons F_1, F_2 and F_3, and one great great-grandson *K*.



Here there are four branches of the joint family represented respectively by the four sons of *A* and their descendants. *E*'s branch takes nothing as *K*, the only surviving member of that branch, is outside the limits of the coparcenary, being beyond the fourth degree of descent from *A*, the common ancestor [s. 215]. The joint property will therefore be divided *per stirpes* into three parts corresponding to the remaining three branches, each branch taking 1/3. The result is that *B* will take 1/3, C_1 and C_2 will take the one-third share of *C* equally between them, each taking 1/2 of 1/3, *i.e.*, 1/6, and F_1, F_2 and F_3 will take the one-third share of *D* equally between them each taking 1/3 of 1/3, *i.e.*, 1/9.

(b) *A* dies leaving four grandsons, *D*, *E*, *F* and *G*, and nine great-grandsons as shown in the following diagram :—

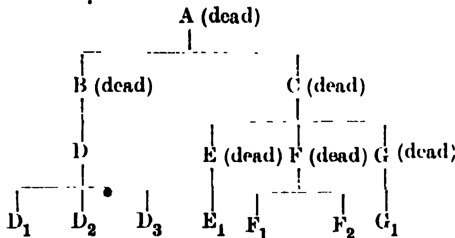


All the coparceners are desirous of separating from one another. Here there are two branches of the joint family represented respectively by the two sons of *A*. The

(c) *Pranjivandas* v. *Ichharam* (1915) 39 Bom. 734, 30 I.C. 918, ('15) A. B. 255.

property will, therefore, be divided into two parts, B's branch taking 1/2, and C's branch taking 1/2. As to B's branch, D and his sons D_1, D_2 and D_3 will each take 1/4 of 1/2, *i.e.*, 1/8, each son taking a share equal to that of the father. As to C's branch, each of the three sub-branches represented by E, F and G, will take 1/3 of 1/2, *i.e.*, 1/6, E and E_1 will each take 1/2 of 1/6, *i.e.*, 1/12; F, F_1 and F_2 will each take 1/3 of 1/6, *i.e.*, 1/18, and G, G_1, G_2 and G_3 will each take 1/4 of 1/6, *i.e.*, 1/24. **S. 321**

(c) A Hindu, A, governed by the Mitakshara school of Hindu law, dies leaving a grandson D, and seven great-grandsons as shown in the following diagram :—

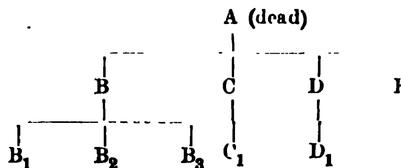


D_1, D_2, F_1, F_2, and G_1 institute a suit against D, D_3, and E_1 for partition. What are the respective shares of the parties in the property? Here there are two branches of the joint family; the property will therefore be divided into two parts, B's branch taking 1/2 and C's branch taking 1/2. As to B's branch, D and his sons D_1, D_2, and D_3 will each get 1/4 of 1/2, *i.e.*, 1/8. As to C's branch each of the three sub-branches represented by E, F and G, will get 1/3 of 1/2, *i.e.*, 1/6. E_1 will get 1/6, F_1 and F_2 will each get 1/2 of 1/6, *i.e.*, 1/12, and G_1 will get 1/6. The five plaintiffs take their respective shares, and leave the family. D, D_3 and E_1 continue joint as before. Their shares, it has been seen, are as follows :—

D	—— 1/8
D_3	—— 1/8
E_1	—— 1/6
	5/12

D then dies. After D's death, his son D_3 sues E_1 to recover his share of the family property. What is the share of D_3 in the property? According to the Bombay High Court, D_3 as representing B's *branch* is entitled to $1/2 \times 5/12 = 5/24$, and E_1 as representing C's *branch* is entitled to the remaining 5/24. According to the Madras High Court, on the death of D, the right to represent his share passes to his son D_3 so that D_3 is entitled to get $1/8 + 1/8$, *i.e.*, 1/4 and E_1 retains his original share 1/6. See rule 3 above.

(d) A Hindu, A, governed by the Mitakshara school of Hindu law, dies leaving four sons, B, C, D and E, and five grandsons, B_1, B_2, B_3, C_1, and D_1, as shown in the following diagram :—



Thereafter B dies. In 1892, B_2 receives his share $1/3 \times 1/4 = 1/12$, and leaves the family. The rest of the family continues joint. Then C dies, then D, then E, and then B_3.

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In 1911, B_1 sues C_1 and D_1 for a partition. According to the Bombay High Court the property is to be divided into three parts, as there are three branches subsisting at the date of the suit, namely, B's branch, C's branch, and D's branch, so that B_1, C_1 and D_1 will each take 1/3. According to the Madras High Court B_1 is entitled to 1/3—1/12 [1/12 being the share allotted to B_2 when he left the family]=1/4, and not 1/3. See rule 3 above.

V.—PARTITION HOW EFFECTED.

322. What is Partition.—(*1*) According to the true notion of an undivided Mitakshara family, no individual member of that family, whilst it remains undivided, can predicate of the joint property, that he—that particular member—has a certain definite share, one-third or one-fourth. Partition, according to that law, consists in a *numerical* division of the property, in other words, it consists in *defining the shares* of the coparceners in the joint property; an actual division of the property by metes and bounds is not necessary (*d*). Once the shares are defined, whether by an agreement between the parties or otherwise, the partition is complete. After the shares are so defined, the parties may divide the property by metes and bounds, or they may continue to live together and enjoy the property in common as before. But whether they do the one or the other, it affects only the *mode of enjoyment*, but not the *tenure* of the *property*. The property ceases to be joint immediately the shares are defined, and thenceforth the parties hold the property as tenants-in-common (*e*). Where at a partition between a Hindu, his two sons, and his two wives one-fifth was allotted to each of the sons and three-fifths to the father and his wives, it was held that the father and his wives became tenants-in-common, but though they had not divided their shares by metes and bounds *inter se* there could be no re-union between them, and the father therefore had no right to sell the properties of the wives and any such alienation by him was not binding on them (*f*).

(*2*) The importance of the question whether there has been a partition or not lies particularly in the following respects :—

(i) An *undivided* Hindu governed by the Mitakshara school has no power to dispose of his interest in the joint

(*d*) *Appovier* v. *Rama Subba Aiyan* (1866) 11 M. I.A. 75, 89-90 ; *Ram Pershad* v. *Lakhpati* (1903) 30 Cal. 231, 255, 30 I.A. 1 ; *Sheodan* v. *Balkaran* (1921) 43 All. 193, 59 I.C. 116, ('21) A.A. 337.

(*e*) *Balkishen Das* v. *Ram Narain* (1903) 30 Cal. 738, 751, 752, 30 I.A. 139.

(*f*) *Nanuram* v. *Radhabai* (1942) Nag. 24, ('40) A.N. 241.

property by gift or by will [s. 258]; nor can he alienate his interest even for value except in the Bombay and Madras Presidencies [ss. 259, 260]. A *divided* member can, except where he continues joint with his own male issue [s. 223, sub-s. (*4*)], deal with the share allotted to him at the partition as his separate property; he may sell it, mortgage it, make a gift of it, or devise it by will.

(ii) The undivided interest of a coparcener passes on his death to the surviving coparceners [s. 229]. The share allotted to a coparcener on partition passes on his death to his heirs, except where he has remained joint with his own male issue in which case it goes to them by survivorship [s. 223, sub-s. (*4*)].

(iii) Partition between male coparceners entitles the wife, mother, and grandmother to a share in the joint property [ss. 315-317]: they are not entitled to any such share until division by metes and bounds (*g*).

(iv) There can be no reunion until there has been a partition. To determine the question whether there has been a reunion, it may become necessary to determine whether there has been a partition (*h*).

323. Partition by father during his lifetime. The father of a joint family has the power to divide the family property at any moment during his life, provided he gives his sons equal shares with himself, and if he does so, the effect in law is not only a separation of the father from the sons, but a separation of the sons *inter se*. The consent of the sons is not necessary for the exercise of that power (*i*). But a grandfather has no power to bring about a separation among his grandsons. Even if he allots shares, they remain joint (*j*). The right of a father to sever the sons *inter se* is a part of the *patria potestas* still recognized by the Hindu law (*k*).

When under a partition by a father *unequal* shares are given to the sons, the transaction will be binding on the sons as a *family arrangements*, if acquiesced in by them (*l*).

(*g*) *Pratapmull Agarwalla* v. *A. Dhanabati Bibi* (1936) 63 I. A. 33, 63 Cal. 691, 38 Bom. L. R. 323, 159 I.C. 1080, (36) A.PC. 20.

(*h*) This was the case in *Bala* v. *Gopal* (1907) 5 Cal. L.J. 417 [a Dayabhaga case], and *Lakshmibai* v. *Ganpat* (1868) 4 Bom. H.C. O. C. 150, 166.

(*i*) *Kandasami* v. *Doraisami* (1880) 2 Mad. 317, 321. *Nirman* v. *Fateh* (1930) 52 All. 178, 126 I.C. 337, ('29) A A 963.

(*j*) *Subbarami Reddi* v. *Chenchuraghava Reddi* (1915) Mad. 1714.

(*k*) But see West and Bühler, 4th Ed., p. 617.

(*l*) *Brijraj Singh* v. *Sheodan Singh* (1913) 35 All. 337, 40 I.A. 161, 19 I.C. 826.

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324. Whether father can effect partition by a will.—No coparcener, not even the father; has a right to make a partition by will of joint family property among the various members of the family except with their consent (*m*).

325. How partition may be effected.—Partition is a severance of joint status, and as such it is a matter of individual volition (*n*). All that is necessary, therefore, to constitute a partition is a *definite and uneqivocal indication of his intention* by a member of a joint family to separate himself from the family and enjoy his share in severalty. It is immaterial, in such a case, whether the other members assent. Once a member of a joint family has clearly and unequivocally intimated to the other members his desire to sever himself from the joint family, his right to obtain and possess his share is unimpeachable whether or not they agree to a separation, and there is an immediate severance of the joint status. The intention to separate may be evinced in different ways, either by explicit declaration or by conduct (*o*). It may be expressed by serving a notice on the other coparceners (*p*), and the severance of status takes place from the date when the communication was sent and not when it was received (*q*). The notice, however, may be withdrawn with the consent of the other coparceners (*r*). It may also be expressed by the institution of a suit for partition. An oral request made by an elder brother, at the time of his death, to his younger brother to give half the property to the widow of the former, does not amount to a separation (*s*). Where a simple money decree was obtained against the father and in a suit on behalf of his minor sons for a declaration that the debt for which the decree was passed was immoral, the District Munsiff found that the debt was not immoral but on the ground that the decree was a money decree, declared that the sons' share was not liable to be sold in execution, it was held that these facts did not constitute separation of the sons from the father (*t*).

(*m*) (1913) 35 All. 337, 346, 40 I.A. 161, 19 I.C. 826, *supra*; *Harkesh Singh* v. *Hardevi* (1927) 49 All. 763, 102 I.C. 66, ('27) A.A. 454.

(*n*) *Girja Bai* v. *Sadashiv* (1916) 43 I.A. 151, 161, 43 Cal. 1031, 1049, 37 I.C. 321, ('16) A PC. 104.

(*o*) *Dnyaneshwar Krishna* v. *Anant Vasudeo* (1936) 60 Bom. 736, 38 Bom. L.R. 579, 164 I.C. 632, ('36) A.B. 290.

(*p*) *Girja Bai* v. *Sadashiv* (1916) 43 I.A. 151, 43 Cal. 1031, 37 I.C. 321, ('16) A.PC. 104, *supra*.

(*q*) *Narayana Rao* v. *Purushothama Rao* (1938) Mad. 315, ('38) A.M. 390.

(*r*) *Banke Bihari* v. *Brij Bihari* (1929) 51 All. 519, 116 I.C. 285, ('29) A.A. 170.

(*s*) *Shivappa Rudrappa* v. *Rudrava Chanbasappa* (1933) 57 Bom. 1, 142 I.C. 164, ('32) A.B. 410.

(*t*) *Patru Lal* v. *Parbhawati Kuer* (1943) All. 205, 207 I.C. 228, ('43) A.A. 214.

(1) *Partition by institution of suit.*—(i) *Suit by adults.*— The institution of a suit for partition by a member of a joint family is an unequivocal intimation of his intention to separate, and there consequently is a severance of his joint status from the date when it is instituted. A decree may be necessary *for working out the results of the severance and for allotting definite shares,* but the status of the plaintiff as separate in estate is brought about by his assertion of his right to separate, whether he obtains a consequential judgment or not (*u*). And if the plaintiff dies the suit can be continued by the heir (*v*). But if the suit is withdrawn before trial, the plaintiff not desiring separation, there is no severance of the joint status (*w*). Or if the defendant dies and the suit is withdrawn on that ground there is no separation (*x*). Even a decree passed by consent does not effect a severance if its terms are not carried out and the members continue to live together having abandoned their decision to separate (*y*). S. 325

Withdrawal before trial.—This means withdrawal before final decree (*z*).

In *Palani Ammal*'s case (*a*), the Judicial Committee observed that a plaint claiming a partition, even if withdrawn, would, unless explained, afford evidence that an intention to separate had been entertained.

(ii) *Minor's suit for partition.*—It has been held by the High Court of Allahabad (*b*), that the mere institution of a suit for partition by a minor followed by the abatement of the suit by the death of the sole defendant does not effect a severance of the joint status [for reasons see sec. 308]. In a suit for partition brought by the father and his minor son as plaintiffs against the other members of the joint family, in which it was contended by the minor's mother as the guardian, and found by the Court that the separation was not in the interests of the minor, it was held, that the institution of the suit does not

(*u*) *Girja Bai* v. *Sadashiv* (1916) 43 I.A. 151, 43 Cal. 1031, 37 I.C. 321, ('16) A.PC. 104; *Kawal Nain* v. *Prabhulal* (1917) 44 I.A. 159, 39 All. 496, 40 I.C. 286, ('17) A.PC. 39; *Suraj Narain* v. *Iqbal Narain* (1913) 40 I.A. 40, 45, 35 All. 80, 87, 18 I.C. 30, *Ramalinga* v. *Narayana* (1922) 49 I.A. 168, 45 Mad. 489, 68 I.C. 451, ('22) A.PC. 201; *Soundararajan* v. *Arunachalam* (1916) 39 Mad. 136, 33 I.C. 858, ('16) A.M. 1170 [F.B.]; *Hazari Lal* v. *Ram Lal* (1925) 47 All. 746, 88 I.C. 422, ('25) A.A. 813. The same rule applies where the estate is impartible; *Jagadamba* v. *Narain Singh* (1923) 2 Pat. 319, 50 I.A. 1, 77 I.C. 1041, ('23) A.PC. 59; *Dhanabathi Bibi* v. *Pratapmull Agarwalla* (1934) 61 Cal. 1056, 154 I.C. 655, ('35) A.C. 131.

(*v*) *Rajrup Rai* v. *Sheo Shankar Rai* (1945) All. 287

(*w*) *Kedar Nath* v. *Ratan Singh* (1910) 37 I.A 161, 32 All. 415, 7 I.C. 648; *Palani Ammal* v. *Muthuvenkatacharla* (1925) 52 I.A 83, 48 Mad. 254, 87 I.C. 333, ('25) A.PC. 49; *Shagun Chand* v *Data Ram* (1927) 49 All. 664, 101 I C. 868, ('27) A A. 465.

(*x*) *Shankersingh* v. *Gulapchand* (1945) Nag. 444.

(*y*) *Chokalingam* v. *Muthukaruppan* (1938) Mad. 1019, ('38) A.M 849.

(*z*) See *Ganapathy* v. *Subramanyam* (1929) 52 Mad 845, 851, 122 I.C. 167, ('29) A.M.738.

(*a*) (1925) 52 I.A. 83, 48 Mad. 254, 87 I.C. 333, ('25) A.PC. 49, *supra*.

(*b*) *Lalta Prasad* v. *Sri Mahadeoji* (1920) 42 All. 461, 58 I.C. 667, ('20) A.A. 116.

S. 325 effect a separation of the minor from the rest of the family, though it may operate as a separation of the father from the rest of the family (*c*). If the Court holds that a division is necessary in the interests of the minor and passes a preliminary decree for partition, the divided status of the minor dates from the date of the institution of the suit and not from the date of the preliminary decree (*d*). In a suit for partition filed on behalf of the minor son against the father the plaint was returned to be presented to the proper Court and, after an interval, was re-presented and the Court found the partition was beneficial to the interests of the minor. In the interval the father executed a mortgage. It was held that the son became divided from the father only from the date of re-presentation of the plaint and that it could not be contended that the mortgage was not binding on the son on the ground that they were divided when it was executed. It was also held that the document was not affected by the principle of *lis pendens* (*e*). In a minor's suit for partition, where another son was born to the plaintiff's father even before the preliminary decree, it was held by the High Court of Patna that the institution of the suit itself effected a severance of the joint status and that the minor's share did not suffer a diminution by reason of the birth of another son (*f*). Where a minor plaintiff died during the pendency of the suit, it was held by the High Court of Madras, overruling an earlier decision of that Court (*g*), that the question whether the minor became separate in status from the date of the plaint was dependent on the decision of the issue whether the partition would be for the benefit of the minor (*h*) and that the legal representative of the minor was entitled to come on the record for the purpose of having that question decided (*i*).

According to a Patna decision, his interest will pass to his heirs unconditionally (*j*). As to the effect on the minor plaintiff's shares by subsequent births and deaths, see also sec. 330 below.

(2) *Partition by agreement.*—A partition may also be effected by an agreement between the parties [s. 326]. In some

(*c*) *Ganpathy* v. *Subramanyam* (1929) 52 Mad. 845, 122 I.C. 167, ('29) A.M. 738.

(*d*) *Krishnaswami* v. *Pulukaruppa* (1925) 48 Mad. 465, 88 I.C. 424, ('25) A.M. 717; *Sri Ranga* v. *Srinivasa* (1927) 50 Mad. 866, 104 I.C. 72, ('27) A.M. 80; *Atul Krishna Roy* v. *Lala Nandanji* (1935) 14 Pat. 732 [F.B.], 157 I.C. 53 ('35) A.P. 275; *Ram Singh* v. *Fakira* (1939) Bom. 256.

(*e*) *Nathusingh* v. *Anandrao* (1941) Nag. 652, 186 I.C. 688, ('40) A.N. 185.

(*f*) *Krishna Lal* v. *Nandeshwar* (1919) 4 Pat. L.J. 38, 46-48, 44 I.C. 146, ('18) A.P. 91.

(*g*) *Chelimy Chetty* v. *Subamma* (1918) 41 Mad. 442, 42 I.C. 860, ('18) A.M. 379.

(*h*) *Kotayya* v. *Krishna* (1945) Mad. 710 and next case.

(*i*) *Rangasayi* v. *Nagaratnamma* (1934) 57 Mad. 95 [F.B.], 146 I.C. 769, ('33) A.M. 890.

(*j*) *Krishna Lal* v. *Nandeshwar* (1919) 4 Pat. L.J. 38, 46-48, 44 I.C. 146, ('18) A.P. 91.

cases it is stated that a severance of joint status can take place only by agreement between the parties or by a decree of the Court [s. 329]. But this is a mistaken view (*k*). As stated above, a definite and unambiguous indication by one member of his intention to separate and to enjoy his share in severalty may amount to a partition.

(3) *Partition by arbitration.*—An agreement between the members of a joint family whereby they appoint arbitrators for dividing the joint family properties among them amounts to a severance of the joint status of the family from the date thereof (*l*). The mere fact that no award has been made is not evidence of a renunciation of the intention to separate (*m*). Where a father refers the family dispute between himself and his minor son (represented by his mother) to an arbitrator, the award of the arbitrator directing a partition effects a severance between the father and the son from its date (*n*).

It is a mistake to suppose that there can be no partition until there is a division of the joint family property by metes and bounds. It is very important to keep the two considerations quite distinct from each other, namely, partition, that is, the severance of the joint status, which is a matter of individual decision, and the *de facto* division of the property, that is, the allotment of shares which may be effected by different methods, *e.g.*, by private agreement, by arbitrators appointed by the parties or, in the last resort, by the Court (*o*).

A coparcener does not on insolvency cease to be a member of a joint family, nor does the fact that a coparcener has alienated the whole or part of his undivided share, effect a partition between him and his family (*p*).

Illustrations.

(a) *A* and his brothers *B* and *C* are members of a joint Hindu family. *A* sues *B* and *C* for partition. After the suit, but before the decree, *A* dies leaving a widow. *A*'s share does not pass by survivorship to *B* and *C*, but it descends to his widow as his heir, and she as such is entitled to continue the suit: *Girja Bai* v. *Sadashiv* (1916) 43 I.A. 151, 43 Cal. 1031, 37 I.C. 321, ('16) A.PC. 104. The result would be the same if *A*, *B* and *C* appointed an arbitrator to partition the property, and *A* died pending arbitration: *Syed Kasam* v. *Jorawar Singh* (1922) 49 I.A. 358, 50 Cal. 84, 68 I.C. 573, ('23) A.PC. 353.

(*k*) *Girja Bai* v. *Sadashiv* (1916) 43 I.A. 151, 162, 43 Cal. 1031, 1050, 37 I.C. 321, ('16) A.PC. 104.

(*l*) *Syed Kasam* v. *Jorawar Singh* (1922) 49 I.A. 358, 50 Cal. 84, 68 I.C. 573, ('23) A.PC. 353; *Krishna* v. *Balaram* (1896) 19 Mad. 290; *Subbaraya* v. *Sadashiva* (1897) 20 Mad. 490; *Balmukund Lal* v. *Musammat Sohano* (1929) 8 Pat. 153, 119 I.C. 817, ('29) A.P. 164.

(*m*) *Ram Kali* v. *Khamman Lal* (1929) 51 All. 1, 111 I.C. 33, ('28) A.A. 422

(*n*) *Shantilal Mewaram* v. *Munshilal Kewalram* (1932) 56 Bom. 595, 139 I.C. 820, ('32) A.B. 498.

(*o*) (1916) 43 I.A. 151, 161, 43 Cal. 1031, 1049, 37 I.C. 321, ('16) A.PC. 104, *supra*; *Mukund* v. *Balkrishna* (1927) 54 I.A. 413, 419, 52 Bom. 8, 15, 105 I.C. 703, ('27) A.PC. 224.

(*p*) *Lakshmanan Chettiar* v. *Srinivasa Iyengar* (1937) Mad. 203, 166 I.C. 378, ('37) A.M. 131.

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(b) *A* and his father *B* are members of a joint Hindu family. *A* sues *B* for partition. *B* admits that he and *A* are joint, but alleges that the fact stated in the plaint, namely, that *B* had failed to maintain *A is untrue*, and asks that *A*'s suit should be dismissed. The suit is dismissed on the ground that the facts alleged by *A* in his plaint are not proved. Such a dismissal is quite wrong. The institution of the suit operates as a partition between *A* and *B*, though the suit is dismissed: *Kawal Nain* v. *Prabhu Lal* (1917) 44 I.A. 159, 39 All. 496, 40 I.C. 286, ('17) A.PC. 39. See sub-sec. (*1*) above.

326. Partition by agreement.—(*1*) As regards partition, no act done by any member of a joint family can operate as a partition, unless it has been done with the *intention* to put an end to his *status* as a coparcener and acquire a new *status*, that is, the *status* of a separate owner (*q*) [s. 325]. As stated by their Lordships of the Privy Council in the leading case of *Appovier* v. *Rama Subba Aiyan* (*r*), the true test of partition of property according to Hindu law [is] the *intention* of the members of the family to become separate owners. *Intention* being the real test, it follows that an agreement between the members of a joint family to hold and enjoy the property *in defined shares as separate owners* operates as a partition, although there may have been *no actual division of the property by metes and bounds*. As observed by the Judicial Committee in the case above referred to (*s*), "when the members of an undivided family agree among themselves with regard to a particular property, that it shall thenceforth be the *subject of ownership, in certain defined shares*, then the character of undivided property and joint enjoyment is taken away from the subject-matter so agreed to be dealt with; and in the estate each member has thenceforth a definite and certain share, which he may claim the right to receive and to enjoy in severalty, *although the property itself has not been actually severed and divided*." In such a case the *interest* of each member is divided though the *property* remains physically undivided. That interest, therefore, will descend, and may be dealt with, as separate property, except where the separating member remains joint with his own male issue (*t*) [s. 223.

(*q*) *Appovier* v. *Rama Subba Aiyan* (1866) 11 M. I.A. 75, 92-93; *Baboo Doorga Pershad* v. *Kundun* (1874) 13 Beng. L.R. 235, 239, 1 I.A. 55.

(*r*) (1866) 11 M.I.A. 75, 90.

(*s*) *Ibid.*

(*t*) *Rajah Suraneni* v. *Venkama Row* (1869) 13 M. I. A. 113; *Doorga Persad* v. *Kundun* (1873) 13 Beng. L. R. 235, 1 I.A. 55; *Balkishen Das* v. *Ram Narain* (1903) 30 Cal. 738, 30 I.A. 139; *Ram Pershad* v. *Lakhpati* (1903) 30 Cal. 231, 253, 30 I.A. 1, 10; *Parbati* v. *Naunihal Singh* (1909) 31 All. 412, 36 I.A. 71, 3 I.C. 195; *Mahdo* v. *Mehrban* (1891) 18 Cal. 157, 17 I.A. 194; *Sri Raja Viravara* v. *Sri Raja Viravara* (1897) 20 Mad. 256, 24 I.A. 118; *Raja Setrucherla* v. *Raja Setrucherla* (1899) 22 Mad. 470, 26 I.A. 167; *Gajapathi* v. *Gajapathi* (1870) 13 M.I.A. 497, 517; *Babaji* v. *Kashibai* (1880) 4 Bom. 157; *Ananta* v. *Damodhar* (1889) 13 Bom. 25; *Tej Protap* v. *Champa* (1886) 12 Cal. 96; *Sarada* v. *Umakanta* (1923) 50 Cal. 370, 392, 77 I.C. 450, ('23) A.C. 485; *Adi Deo* v. *Dukharan* (1883) 5 All. 532; *Raghubir* v. *Moti Kunwar* (1913) 35 All. 41, 17 I.C. 766 [P.C.].

sub-s. (*4*)]. A partition, if otherwise genuine, will sever the joint status even if the motive is to defeat the claims of creditors (*u*). Where a member of the joint family executed a sham sale deed in favour of his brother it was held that he did not become divided from the family and on his death his nephews got the property by survivorship and his creditor could not execute a money-decree against the property which so devolved on his nephews (*v*). The filing of a suit is only evidence but not conclusive evidence of an intention to separate (*w*). **S. 326**

The mere fact, however, that the shares of the coparceners have been ascertained does not by itself necessarily lead to an inference that the family has separated. There may be reasons other than a contemplated immediate separation for ascertaining what the shares of the coparceners on a separation would be. To constitute a partition the shares should be defined with the intention of an immediate separation (*x*). For an instance where there was no such intention, see *Poornanandachi* v. *Gopalasami* (1936) 63 I.A. 436, 38 Bom. L.R. 1247, 164 I.C. 26, ('36) A.P. 281, and sec. 327 (*3*).

(*2*) An agreement to separate is not required by law to be in writing (*y*). If it *is* in writing, and *clearly indicates on the face of it* an intention to separate and hold the property in defined shares as separate owners, no evidence is admissible of the *subsequent* acts of the parties to alter or control its legal effect (*z*). But where the agreement is not in writing, or, where it is in writing, but does not declare on the face of it what the intention of the parties was, evidence of subsequent conduct of the parties becomes very material in order to determine whether there was a partition or not (*a*). This subject is further explained in the next section in another form.

(*u*) *Kuppan Chettiar* v. *Masa Goundan* (1937) Mad. 1004, 169 I.C. 400 ('37) A.M. 424.

(*v*) *Merla Ramanna* v. *Chelikani Jagannadha Rao* (1942) Mad. 886, 195 I.C. 1, 68 I.A. 75 ('42) A.PC. 48.

(*w*) *Joala Prasad Singh* v. *Mst. Chanderjot Kuer* (1938) 17 Pat. 430, 175 I.C. 783, ('38) A.P. 278.

(*x*) *Palani Ammal* v. *Muthuvenkatacharla* (1925) 52 I.A. 83, 86, 48 Mad. 254, 267-268, 87 I.C. 333, ('25) A.PC. 49; *Ramabadra* v *Gopalaswami* (1931) 54 Mad. 269, 129 I.C 801, ('31) A.M. 404.

(*y*) *Rewun Persad* v. *Radha Beeby* (1846) 4 M. I. A. 137, 168; *Budha Mal* v. *Bhagwan Das* (1891) 18 Cal. 302 [P.C.]; (1909) 31 All. 412, 422-423, 36 I.A. 71, 3 I.C 195, *supra*: *Alamelu* v. *Balu* (1920) 43 Mad 849, 26 I.C. 455, ('15) A.M 103

(*z*) *Balkishen Das* v. *Ram Narain* (1903) 30 Cal 738, 752, 30 I.A. 139. [case of an unambiguous *ikrarnamah*]. *Jai Narain* v *Baijnath* (1928) 50 All. 615, 108 I C 149, ('28) A A. 119, *Hira Singh* v *Mst Manglan* (1928) 9 Lah 324, 106 I C 877, ('28) A.L 122

(*a*) *Doorga Persad* v *Kundun* (1874) 13 Beng L R. 235, 239-240, 1 I A 55 [case of an ambiguous *ikrarnamah*] *Ram Pershad* v *Lakhpati* (1903) 30 Cal 231, 253, 30 I A 1, 10 [case of an ambiguous decree] *Chowdhry Ganesh Dutt* v *Jewach* (1904) 31 Cal 262, 270, 31 I A 10 [case where there was no writing]

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Illustration.

A joint Hindu family consisting of six members is entitled to a moiety of certain villages and to three other properties, namely, *x*, *y* and *z*. All the six members execute a deed whereby they divide the three properties, *x*, *y* and *z*, by metes and bounds into six parts, each taking one-sixth. As to the moiety belonging to the family in the said villages, the deed says: "But inasmuch as it is not convenient to divide now [that is, to divide by metes and bounds] our moiety of the villages, we shall divide every year *in six shares the produce of them* and enjoy it, after deducting the Sirkar's *kist* and charges on the villages." The deed concludes with the words "we have henceforward *no interest in each other's effects and debts* except friendship between us." The question is whether the deed operates as a partition of the family's interests in the villages, regard being had to the fact that there was no division of the villages by metes and bounds. The answer is that it does, as the effect of the deed is—using the language of the English Law merely by way of illustration—that the joint tenancy is severed and converted into a tenancy in common. In delivering the judgment of the Judicial Committee, Lord Westbury said: "Then, if there be a conversion of the joint tenancy of an undivided family into a tenancy in common of the members of that undivided family, the undivided family becomes a divided family with reference to the property that is the subject of that agreement, and that is a *separation in interest and in right*, although not immediately followed by a *de facto actual division* of the subject-matter. This may at any time be claimed by virtue of the separate right . . . . We find therefore a clear intention to subject the whole of the property to a *division of interest*, although it was not immediately to be perfected by an actual partition. It [the deed] operated in law as a conversion of the character of the property and an alteration of the title of the family, converting it from a joint to separate ownership, and we think the conclusion of law is correct, *viz.*, that that is sufficient to make a divided family, and to make a divided possession of what was previously undivided, without the necessity of its being carried out into an actual partition of the subject-matter": *Appovier* v. *Rama Subba Aiyan* (1866) 11 M.I.A. 75. [It is enough to constitute a partition that there should be a division of *title*: it is not necessary that there should be an actual division of the *property*].

Registration.—A mere agreement to divide does not require registration. But if the writing itself effects a division it must be registered (*b*). Where the plaintiff alleged that all the family properties were divided except one item and the defendant denied the partition, it was held that an unregistered document evidencing the partition may be used for the limited and collateral purpose of showing that the subsequent division of the properties allotted to the defendant's branch was in pursuance of the original intention to divide (*c*).

327. Evidence of partition and burden of proof.—This branch of the subject may be divided into four parts :—

1. The clearest case is where the members of a joint family divide the joint property by metes and bounds, and each member is in separate possession and enjoyment of the share allotted to him on partition.

2. The next case is of the kind dealt with by the Privy Council in *Appovier* v. *Rama Subba Aiyan* (*d*), that is, the

(*b*) *Rajangam* v. *Rajangam* (1923) 46 Mad. 373, 50 I.A. 134, 69 I.C. 123, ('22) A.P.C. 266; *Chhotalal* v. *Bai Mahakore* (1917) 41 Bom. 466, 40 I.C. 83, ('17) A.B. 206.

(*c*) *Ganpat* v. *Namdeo* (1942) Nag. 73, 196 I.C. 278, ('41) A.N. 207.

(*d*) (1866) 11 M.I.A. 75.

case where the coparceners, with a view to partition execute a writing whereby they agree to hold the joint property *in defined shares as separate owners*. Such a writing operates in law as a partition though the property is not physically divided. This is a case where the agreement *declares on the face of it* the intention of the parties to hold the joint property as separate owners, and no evidence is admissible of the subsequent acts of the parties to control or alter the legal effects of the document [s. 326, sub-s. (2)].

3. The third case is of the kind dealt with by the Privy Council in *Doorga Persad* v. *Kundun* (e), that is, the case where the agreement is in writing, but the document *does not declare on the face of it* the intention of the parties to hold the joint property as separate owners. In such a case, when the question arises as to whether the document operates as a partition, the intention of the parties is to be inferred from (1) the document and from (2) their subsequent acts (*f*) [s. 326, sub-s. (2)]. Where an instrument of partition after giving one member his share provides that the rest of the property is to be divided in a particular manner and that the remaining members should live like an ordinary undivided family subject to survivorship, it was held by the Privy Council that there was no partition between the other members (*g*).

4. The last case is of the kind dealt with by the Privy Council in *Ganesh Dutt* v. *Jewach* (*h*), that is, the case where there is no writing at all. In such a case, when the question arises as to whether there has been a partition or not, the intention of the parties as to separation can only be inferred from their acts. In *Ganesh Dutt*'s case, a Hindu widow alleging that her husband *B* has separated from his three brothers in Fasli 1295 brought a suit against them to recover her husband's share in the family property as his heir. The defence was that *B* died joint and undivided. The Privy Council held that there was a partition as evidenced by the following five facts: (1) payment of revenue of certain villages belonging to the family, one-fourth in the name of *B* and three-fourths in the names of his three brothers; (2)

(e) (1873) 13 Beng. L.R. 235, 1 I.A. 55.
(f) *Doorga Persad* v. *Kundun* (1873) 13 Beng. L.R. 235, 239, 1 I.A. 55.
(g) *Poornanandachi* v. *Gopalasami Odayar* (1936) 63 I.A. 436, 38 Bom. L.R. 1247, 164 I.C. 26, ('36) A.PC. 281.
(h) (1904) 31 Cal. 262, 31 I.A. 10; *Durga* v. *Lal Bahadur* (1929) 4 Luck. 138, 112 I.C. 387, ('28) A.O. 509. See also *Budha Mal* v. *Bhagwan Das* (1891) 18 Cal. 302 [P.C.].

S. 327 crediting to *B* in Fasli 1295 one-fourth of a share of Rs. 35,000 recovered by the family under a decree and three-fourths to the three brothers; (3) payment of rent by a lessee of a factory belonging to the family as to one-fourth to *B* and as to three-fourths to the three brothers; (4) purchase in Fasli 1295 by the four brothers of an estate in their names *in equal shares;* and (5) a suit instituted after *B*'s death by one of his brothers as the adopted son and *heir* of *B* to recover a debt due to the family; as to this last fact it is to be observed that if *B* had died undivided, the suit would have been brought by the *surviving brothers* and the adopted son *as coparceners*.

In the above case it was also contended on behalf of *B*'s widow that *B* had become separate from his brother *in food and worship* in Fasli 1295, and that that fact was of itself conclusive proof of partition. As to this contention their Lordships said: "Cesser of commensality is *an element* which may properly be considered in determining the question whether there has been a partition of joint family property, but it is *not conclusive*. It is therefore necessary to consider whether the evidence *in other respects* supports or negatives the theory that the cesser in this case was adopted *with a view to partition* in the legal sense of the word." Their Lordships then proceeded to examine the other evidence in the case, and came to the conclusion that the five facts mentioned above supported the theory that the cesser was adopted *with a view to partition*.

Cesser of commensality it is stated above, is not a conclusion proof of partition; the reason is that a member may become separate in food and residence merely for his convenience (*i*). Separate residence of the members of the joint family in different places where they are in service does not show separation (*j*). Similarly, there are other acts which, though *standing by themselves*, are not conclusive proof of partition, yet may lead to that conclusion in conjunction with other facts. They are separate occupation of portions of the joint property (*k*), division of the income of the joint property (*l*), definement of shares in the joint property in the Revenue or

(*i*) *Rewun Persad* v. *Radha Beeby* (1846) 4 M.I.A. 137, 168; *Anundee* v. *Khedoo Lal* (1872) 14 M.I.A. 412, 422; *Suraj Narain* v. *Iqbal Narain* (1913) 35 All. 80, 40 I.A. 40, 18 I.C. 30 [difference in religious opinions].

(*j*) *Mohanlal* v. *Ram Dayal* (1941) 16 Luck. 708, 194 I.C. 61, ('41) A.O. 331.

(*k*) *Runjeet Singh* v. *Gujrat Singh* (1873) 1 I.A. 9; *Murari* v. *Mukund* (1891) 15 Bom. 201.

(*l*) *Sonatun* v. *Juggutsoondree* (1859) 8 M.I.A. 66, 86.

Land Registration records (*m*), etc. "The mere fact that the shares of the coparceners have been ascertained does not by itself necessarily lead to an inference that the family had separated. There may be reasons other than a contemplated immediate separation for ascertaining what the shares of the coparceners on a separation would be" (*n*). The burden however, of proving that the family continued to be joint in such a case lies on the person alleging it (*o*). **Ss. 327, 328**

328. Partial partition.—(*1*) A partition between coparceners may be partial either in respect of the property or in respect of the persons making it (*p*).

(*2*) *Partial as to property.*—It is open to the members of a joint family to make a division and severance of interest in respect of a part of the joint estate, while retaining their status as a joint family and holding the rest as the properties of a joint and undivided family" (*q*). But where there is evidence to show that *the parties intended to sever*, then the joint family status is put an end to, and with regard to any portion of the property which remained undivided the presumption would be that the members of the family would hold it as tenants-in-common unless and until a special agreement to hold as joint tenants is proved (*r*). When a partition is admitted or proved, the presumption is that all the property was divided and a person alleging that family property, in the exclusive possession of one of the members after the partition, is joint and is liable to be partitioned, has to prove his case (*s*).

(*3*) *Partial as to the persons separating.*—Just as a partition may be partial as regards the property, so it may be partial as regards the persons separating. This case arises when there is no general partition amongst all the members of the family.

(*m*) *Gajendar* v. *Sardar Singh* (1896) 18 All. 176; *Ram Pershad* v. *Lakhpati* (1903) 30 Cal. 231, 30 I.A. 1; *Parbati* v. *Naunihal Singh* (1909) 31 All. 412, 36 I.A. 71, 3 I.C. 195; *Nageshar* v. *Ganesha* (1920) 47 I.A. 57, 42 All. 368, 56 I.C. 306, ('20) A.PC. 46; *Must. Bhagwani* v. *Mohan Singh* (1925) 29 C.W.N. 1037, 88 I.C. 385, ('25) A.PC. 132.

(*n*) *Palani Ammal* v. *Muthuvenkatacharla* (1925) 52 I.A. 83, 85, 48 Mad. 254, 257, 87 I.C. 333, ('25) A.PC. 49.

(*o*) *Beti* v. *Sikhdar Singh* (1928) 50 All. 180, 108 I.C. 721, ('28) A.A. 39.

(*p*) *Rewan Persad* v. *Radha Beeby* (1846) 4 M.I.A. 137, 168; *Apporier* v. *Rama Subba Aiyan* (1866) 11 M.I.A. 75, 90, *Muthusami* v. *Nallakulantha* (1895) 18 Mad. 418, *Sudarsanam* v. *Narasimhulu* (1902) 25 Mad. 149-197.

(*q*) *Ramalinga* v. *Narayana* (1922) 49 I A 168 45 Mad. 489, 68 I.C. 451, ('22) A.PC 201.

(*r*) *Dagadu* v. *Sakhubai* (1923) 47 Bom. 773, 73 I.C. 369, ('24) A B. 31, dissenting from *Gorrishankar* v. *Atmaram* (1894) 18 Bom. 611; *Martand* v *Radhabai* (1930) 54 Bom 616, 127 I.C. 510, ('31) A.B. 97, *Beni Pershad* v. *Must Gurdevi* (1923) 4 Lah. 252, 73 I.C. 894, ('23) A.L. 497.

(*s*) *Kumarappa Chettiar* v *Adaikalam Chetty* (1932) 55 Mad. 483, 137 I.C. 616, ('32) A.M. 207.

S. 328 *Separation of one coparcener.*—When one coparcener separates from the others, the question arises whether the latter are to be deemed to be *joint* or *reunited* or *separate.* This distinction is important, for the devolution of the estate of a Hindu is governed by different rules according as he was joint, reunited, or separate. The view taken in the earlier Calcutta cases was that the separation of one member was a separation of all, but as regards the non-separating members the presumption was that they had *reunited* immediately after the separation (*t*). On the other hand, the view taken in some of the later Calcutta cases (*u*), and also in some Madras cases (*v*), was that when one coparcener separated from the others, the presumption was that the latter remained *joint* as before. Since then there have been several important pronouncements by the Judicial Committee. The result of the decisions may be stated as follows :—

(1) The general principle is that every Hindu family is presumed to be joint unless the contrary is proved. This presumption, however, does not continue after one member has separated from the others. As observed by the Judicial Committee, " There is no presumption when one coparcener separates from the others, that the latter remain united...... An agreement amongst the remaining members of a joint family to remain united or to reunite must be proved like any other fact " (*w*). It is open to the non-separating members to remain joint and to enjoy as members of a joint family what remained of the joint family property after such a partition. No express agreement is necessary for this purpose. The intention to remain joint may be inferred from the way in which their family business was carried on after their former coparcener had separated from them (*x*), or it may be inferred

(*t*) *Jaudubchunder* v. *Benodbeharry* (1863) 1 Hyde. 214 ; *Keshub Ram* v. *Nand Kishore* (1869) 11 W.R. 308 ; *Petambur* v. *Hurish Chunder* (1871) 15 W R. 200.

(*u*) *Upendra* v. *Gopeenath* (1883) 9 Cal 817 ; *Bata* v. *Chintamani* (1886) 12 Cal. 262.

(*v*) *Sudarsanam* v. *Narasimhulu* (1902) 25 Mad. 149, 157 ; *Ranganatha* v. *Narayanasami* (1908) 31 Mad 482 ; *Rangasami* v *Sundarajulu* (1916) 31 Mad. L J. 472, 35 I C. 52, ('17) A.M. 722.

(*w*) *Balabux* v. *Rukhmabai* (1903) 30 I A. 130, 137, 30 Cal. 725 [brothers] ; *Jatti* v. *Banwari Lal* (1923) 50 I.A. 192, 4 Lah. 350, 74 I.C. 462, ('23) A PC. 136 [brothers] ; *Bal Krishna* v. *Ram Krishna* (1931) 58 I.A. 220, 53 All 300, 132 I C 613, ('31) A.PC 136 [brothers] ; *Babanna* v. *Parava* (1926) 50 Bom. 815, 100 I.C. 147, ('26) A.B. 68 [brothers] ; *Bhimabai* v. *Gurunathgouda* (1928) 30 Bom. L.R. 850, 114 I.C. 392, ('28) A.B. 367 ; *Martand* v. *Radhabai* (1930) 54 Bom. 616, 127 I.C. 510, ('31) A.B. 97 [brothers]. The decision to the contrary in the following cases do not seem to be correct :—*Sarju Prasad* v. *Nand Gopal* (1927) 2 Luck. 691, 104 I.C. 315, ('27) A.O. 815 ; *Musammat Menda Kuar* v. *Mirtunjai Baksh* (1928) 3 Luck. 220, 105 I.C. 337, ('27) A.O. 489 ; *Ramchandra* v. *Tukaram* (1921) 45 Bom. 914, 61 I.C. 761, ('21) A.B. 276.

(*x*) *Palani Ammal* v. *Muthuvenkatacharla* (1925) 52 I.A. 83, 48 Mad. 254, 87 I.C. 333, ('25) A PC 49.

from other conduct indicating such an intention (*y*). Thus if one brother separates from the other brothers, there is no presumption that the latter remain united. It is a question of intention which must be proved like any other fact. For an instance where under an instrument of partition one member separated from the family and yet there was no severance of the family, see sec. 327 (*3*). **S. 328**

(2) When there has been a separation between the members of a joint family, there is no presumption that there was a separation between one of the members and his descendants. Thus if two brothers *A* and *B* separate, there is no presumption that there was a separation between *A* and his sons, or a separation between *B* and his sons (*z*).

(3) A Hindu father may separate from his sons, and the sons may remain joint or he may separate from his sons by one wife, and remain joint with his sons by another wife. Here again, it is conceived, it is a question of their intention to remain joint which must be proved like any other fact (*a*).

(4) Where in a suit a *decree* is passed for partition, and the question arises whether the separation effected by the decree was only a separation of the plaintiff from his coparceners or was a separation of all the members of the joint family from each other, the decree alone should be looked at to determine that question. It is the decree alone which can be evidence of what was decreed (*b*).

The following are the leading Privy Council cases in their chronological order.—

(a) *Ram Pershad Singh* v. *Lakhpati Koer* (1903) 30 I.A. 1, 30 Cal. 231.—In this case Sir Andrew Scoble, in delivering the judgment of the Board, said: "It was contended on behalf of the appellants in the present case that although the decree in the suit of 1868 may have effected a separation *quoad* Tundan and Tukan, it left the plaintiffs united *inter se*; and that this might have been the legal effect of the decree is undeniable. But here, again, the conduct of the parties must be looked at in order to arrive at what constitutes the true test of partition of property according to Hindu law, namely, the intention of the members of the family to become separate owners."

(b) *Balabux* v. *Rukhmabai* (1903) 30 I.A. 130, 137, 30 Cal. 725.—In this case *three brothers, G, K* and *L*, owned a shop which had been founded by their father. In 1870 *K* separated from his brothers, took out his share amounting to about Rs. 11,000 and

(*y*) *Ram Pershad Singh* v. *Lakhpati Koer* (1903) 30 I.A. 1, 30 Cal. 231.

(*z*) *Hari Baksh* v. *Babu Lal* (1924) 51 I A. 163, 5 Lah. 92, 83 I.C. 418, ('24) A.PC 126; *Deputy Commissioner* v. *Sheo Nath* (1927) 2 Luck. 459, 100 I C. 689, ('27) A.O. 149.

(*a*) But see *Sengoda* v. *Muthu* (1924) 47 Mad. 567, 78 I C. 927, ('24) A M 627

(*b*) *Palani Ammal* v *Muthuvenkatacharla* (1925) 52 I.A 83, 87, 48 Mad 254, 259, 87 I C. 333, ('24) A PC 49, *Ram Pershad* v *Lakhpati* (1903) 30 I A. 1, 10, 30 Cal. 231, 253.

S. 328 started a shop of his own. In 1894 *L*'s son sued *G*'s widow for possession of property held by her as belonging to her husband, alleging that *G* and *L* had continued joint after *K*'s separation, and that on *G*'s death he became entitled to the property by survivorship. The widow denied that her husband continued joint with *G*. It was held that *K* having admittedly separated himself in 1870, the burden lay on the plaintiff to prove that there had been an agreement after *K*'s separation between *G* and *L* to remain united or to reunite, and that no such agreement having been proved, the plaintiff was not entitled to succeed. Lord Davey, in delivering the judgment of the Board, said: "It appears to their Lordships that there is no presumption, when one coparcener separates from the others, that the latter remain united. . . Their Lordships think that an agreement amongst the remaining members of a joint family to remain united or to reunite must be proved like any other fact." It was held that *K* having separated himself in 1870 and no agreement between *G* and *L* to remain united or to reunite having been proved, *G* and *L* must be deemed to have separated. The above observations were explained in case (f) below.

(c) *Balkrishen Das* v. *Ram Narain Sahu* (1903) 30 I.A. 139, 30 Cal. 738.—In the case a joint family consisted *of four cousins.* The cousins entered into an agreement which stated that *defined shares* in the whole joint family property had been allotted to the several coparceners. The agreement also gave them liberty either to live together or to separate their own business. It was held that the agreement defining the shares effected *a partition in estate*, and that evidence of some of the coparceners having continued to enjoy their shares in common would not affect the tenure of the property or their interest in it. It was also held that the clause giving the parties the option of being joint or separate was not inconsistent with a separation in estate.

(d) *Jatti* v. *Banwari Lal* (1923) 50 I.A. 192, 4 Lah. 350, 74 I.C. 462, ('23) A.PC. 136.—In this case a joint family consisted of *four brothers.* The brothers executed a deed by which the joint family property was described *as divided between them*, and one of them was finally paid out. Thereafter the family business was carried on by the three remaining brothers, and the profits of the business were carried *in equal shares to their separate accounts.* In subsequent proceedings the question arose whether the remaining three brothers were joint or separate. It was held that the deed coupled with the mode in which the accounts were kept showed that the remaining three brothers had ceased to be coparceners.

(e) *Hari Baksh* v. *Babu Lal* (1924) 51 I.A. 163, 5 Lah. 92, 83 I.C. 418, ('24) A.PC. 126.—In this case the Judicial Committee held that the fact of a separation having been effected between brothers raises no presumption that there was a separation of the joint family constituted by one of the brothers *and his descendants.* Thus if a joint family consists of two brothers *A* and *B*, and each brother has a son, and *A* and *B* separate there is no presumption that the separation between *A* and *B* involves necessarily a separation between *A* and his son or between *B* and his son. To hold otherwise "would be introducing a novel principle into the law of joint Hindu families governed by the law of the Mitakshara."

(f) *Palani Ammal* v. *Muthuvenkatacharla* (1925) 52 I.A. 83, 48 Mad. 254, 87 I.C. 333, ('25) A.PC. 49.—In this case their Lordships of the Privy Council observed as follows:—"It is also now beyond doubt that a member of such a joint family [that is, Mitakshara family] can separate himself from the other members of the joint family and is on separation entitled to have his share in the property of the joint family ascertained and partitioned off for him, and that the remaining coparceners, *without any special agreement amongst themselves, may continue to be coparceners and to enjoy as members of a joint family* what remained after such a partition of the family property. That the remaining members continued to be joint may, if disputed, be inferred from the way in which their family business was carried on after their previous coparcener

had separated from them. It is also quite clear that if a joint Hindu family separates, the family or any members of it *may agree to reunite* as a joint Hindu family, but such a reuniting is for obvious reasons, which would apply in many cases under the law of the Mitakshara, of very rare occurrence, and when it happens it must be strictly proved as any other disputed fact is strictly proved. The leading authority for that last proposition is *Balabux Ladhuram* v. *Rukhmabai* (c)." **Ss. 328, 329**

(g) *Bal Krishna* v. *Ram Krishna* (1931) 58 I.A. 220, 53 All. 300, 132 I.C. 613, ('31) A.PC. 163—This was a case of partition between brothers. In this case the previous rulings of the Judicial Committee were again considered, and their result was summarized as follows: —" The general principle undoubtedly is that every Hindu family is presumed to be joint unless the contrary is proved. If it is established that one member has separated, does the presumption continue with reference to the others? The decisions of this Board show that it does not [see cases (b) and (d) above]. But it is equally clear on those decisions that the other members of the family may remain joint: it is, again, their Lordships think, a question of their intention, which must no doubt be proved."

(5) In a suit for partition which proceeds to a decree which was made, the decree for a partition is the evidence to show whether the separation was only a separation of the plaintiff from his coparceners or was a separation of all the members of the joint family from each other (*d*).

(6) A *renunciation* by a member of his interest in the family property stands on a different footing altogether from the case where one member *receives his share* in the property and separates from the other members (*e*) [s. 264]. In the former case, the other members continue joint as before.

(7) It has been laid down in some cases that where a partial partition is proved, the presumption is that there has been a complete partition both as to parties and property (*f*). Recent pronouncements of the Judicial Committee show that there is no such general presumption (*g*).

(8) Though a partition may be partial *by mutual agreement* of parties, no coparcener can *by suit* enforce a partial partition against the other coparceners. The *suit* must be one for a *complete* partition [s. 333].

329. Partition by decree of Court.—There are some decisions which lend colour to the view that where a suit is brought for partition, there is no partition or severance of

(c) (1903) 30 I.A. 130, 30 Cal. 725.

(d) *Palani Ammal* v. *Muthuvenkatacharla* (1925) 52 I.A. 83, 48 Mad. 254, 87 I.C. 333, ('25) A.PC. 49.

(e) *Sudarsanam* v. *Narasimhulu* (1902) 25 Mad. 149, 156; *Parsotam Das* v. *Jagannath* (1919) 41 All. 361, 50 I.C. 357, ('19) A.A. 381; *Alluri Venkatapathi Raju* v. *D. Venkatanarasimha Raju* (1936) 63 I.A. 397, (1937) Mad. 1, 38 Bom. L.R. 1238, 164 I.C. 1, ('36) A.PC. 264.

(f) *Vaidyanatha* v. *Aiyasamy* (1909) 32 Mad. 191, 1 I.C. 408; *Anandibai* v. *Hari* (1911) 35 Bom. 293, 10 I.C. 911; *Ramchandra* v. *Tukaram* (1921) 45 Bom. 914, 61 I.C. 761, ('21) A.B. 276.

(g) *Babanna* v. *Parawa* (1926) 50 Bom. 815, 820, 100 I.C. 147, ('27) A.B. 68.

Ss. 329, 330 the joint status until a decree is passed in the suit declaring the rights of the parties interested in the joint family property (*h*). But this view is no longer tenable; for, as held by the Judicial Committee in recent cases, the very *institution* of a suit for partition operates as a partition [except in the case of a minor's suit—s. 325 (*1*) (ii)], though a decree may be necessary for working out the results of the severance and for allotting definite shares [s. 325]. Where a decree for partition is passed, the decree is evidence to show whether the separation was only a separation of the plaintiff from his coparceners or was a separation of all the members of the joint family from each other. "It is the decree alone which can be evidence of what was decreed" (*i*). See S. 325 (*1*).

Although a suit does not in terms seek a partition, yet if it indicates a distinct intention to obtain a separation in estate, and the decree gives effect to that intention such decree [nay, it is submitted, the very institution of the suit] effects a partition as regards the joint title (*j*).

As to decrees in suits for partition, see Code of Civil Procedure, 1908, sec. 54, and O. 20, r. 18.

Suits for partition of Mahals in the United Provinces must be instituted in the Revenue Courts. See the United Provinces Land Revenue Act, 1901.

Births and deaths pending suit.

330. Births and deaths pending suit for partition.—The institution of a suit for partition by a member of the joint family effects a severance of the joint status of the family. His share, therefore, is not liable to be diminished by the birth of another member of the family subsequent to the date of the suit, as the latter is not to be counted for a share, Nor is it augmented by the death of any of the members subsequent to that date as his share will pass to his heirs (*k*).

It is different, however, where the suit is brought by a minor, whether as a sole plaintiff or as a co-plaintiff with an adult coparcener. According to the Madras and Bombay High Courts, the mere institution of such a suit does not effect a severance of the joint status, but if a decree is passed in the suit, the partition dates from the date of the suit [s. 325 (*1*) (ii)]. The result

(*h*) See *Chidambaram* v. *Gauri Nachiar* (1879) 2 Mad. 83, 6 I.A. 177; *Ram Pershad* v. *Lakhpati* (1903) 30 Cal. 231, 30 I.A. 1; *Subbaraya* v. *Manika* (1896) 19 Mad. 345, *Lakhman* v. *Narayan* (1900) 24 Bom 182: *Mahadev* v. *Govind* (1912) 36 Bom. 550, 16 I.C. 991; *Thandayuthapani* v *Raghunatha* (1912) 35 Mad 239, 10 I.C 660.

(*i*) *Palani Ammal* v. *Muthuvenkatacharla* (1925) 52 I.A. 83, 87, 48 Mad. 254, 259, 87 I.C. 333, ('24) A.PC. 49, (1903) 30 Cal. 231, 253, 30 I.A. 1, 10, *supra*.

(*j*) *Joy Narain* v *Girish Chunder* (1879) 4 Cal. 434, 5 I.A. 228.

(*k*) *Girja Bai* v. *Sadashiv* (1916) 43 I.A. 151, 43 Cal. 1031, 37 I.C. 321, ('16) A.PC. 104; *Sayed Kasam* v. *Jorawar Singh* (1922) 49 I.A. 358, 50 Cal. 84, 68 I.C. 573, ('23) A.PC. 353.

is that if a decree *is passed*, the minor's share will not decrease by the birth of a member subsequent to the date of the suit; nor will it increase by the subsequent death of a member. But if the Court *refuses to decree separation* as regards the minor, the minor's share will increase by subsequent deaths (*l*). According to the Patna High Court, the mere institution of a suit by a minor effects a severance of the joint status as much as a suit by an adult [s. 325 (*1*) (ii)]. His share, therefore, is not diminished by subsequent births nor is it increased by subsequent deaths (*m*). **Ss. 330-333**

See the undermentioned case (*n*) where the question was left open.

331. Death of a coparcener pending suit for partition.—*This section is now amalgamated with sec.* 330.

332. Death of a female entitled to a share pending suit for partition.—The share allotted to a female on partition is not her *stridhana* [s. 128]. Therefore if such female dies before the final decree though after the preliminary decree, her share remains an integral part of the estate available for division among the male members of the family (*o*), including those born after the suit but before her death (*p*).

Suit for partition.

333. Suit for partition: parties to the suit: what property it should comprise.—Any one of several members of a joint family is entitled to require partition of joint family property, and his demand to that effect, if not complied with, can be enforced by suit (*q*). The following are the leading points to be noted in connection with a suit for partition:—

(1) *Who may sue for partition.*— Subject to the provisions of sections 307 and 308 every coparcener and every purchaser of the interest of a coparcener is entitled to institute a suit for partition.

A suit by a coparcener excluded from coparcenary property to enforce his right to share therein must be brought within 12 years from the date when the exclusion becomes known to him: The Indian Limitation Act, 1908, Sch. I, art. 127. See s. 235 (3a).

(*l*) *Ganapathy* v. *Subramaniam* (1929) 52 Mad. 845, 122 I.C. 167, ('29) A.M. 738; *Ram Singh* v. *Fakira* (1929) Bom. 256.

(*m*) *Krishna Lal* v. *Nandeshwar* (1919) 4 Pat. L.J. 38, 46-48, 44 I.C. 146, ('18) A.P. 91.

(*n*) *Palaniappa* v. *Alayan* (1921) 48 I.A. 539, 542, 543. 44 Mad. 740, 743, 64 I.C. 439, ('22) A.PC 228

(*o*) *Sheo Dayal* v. *Judoonath* (1868) 9 W.R. 61; *Raoji* v. *Anant* (1918) 42 Bom. 535, 46 I.C. 750, ('18) A.B. 175.

(*p*) *Krishna Lal* v. *Nandeshwar* (1919) 4 Pat. L.J. 38, 48-49, 44 I.C. 146, ('18) A.P. 91.

(*q*) *Madho Parshad* v. *Mehrban Singh* (1890) 17 I.A. 194, 18 Cal. 157, 161.

S. 333 (2) *Parties to suit.*—(a) The plaintiff in a partition suit should implead as defendants:—

(i) the heads of all branches (*r*);

(ii) females who are entitled to a share on partition, that is, the wife, mother, and father's mother [ss. 315-317];

(iii) the purchaser of a portion of the plaintiff's share, the plaintiff himself being a coparcener;

(iv) if the plaintiff himseff is a purchaser from a coparcener, his alienor.

The above are necessary parties and if any of them is not joined, the suit is liable to be dismissed.

(b) It is desirable that the following persons should be made parties; though not necessary parties, they are proper parties to such a suit;

(i) a mortgagee with possession of the family property or of the undivided interest of a coparcener (*s*);

(ii) simple mortgagees of specific items of the family property (*s*);

(iii) purchaser of the undivided interest of a coparcener (*s*);

(iv) persons entitled to provision for their maintenance and marriage, that is, widows, daughters, sisters, and such like, and disqualified heirs;

(v) any person entitled to maintenance from the family (*t*).

The plaintiff may also implead any other coparcener or any person interested in the family property such as a mortgagee or a lessee. Such a person may himself apply and be made a party.

Illustrations.

(1) If *A* has two sons S_1 and S_2 and grandsons by S_1 and S_2 in a suit for partition by S_1 against *A* and S_2, the grandsons are not *necessary* parties, though they may be *proper* parties (*u*).

(2) Where the suit is not for partition between all the coparceners *inter se* but only between the two branches of the families, the heads of each branch are the only necessary parties (*v*).

(*r*) *Pahuladh* v. *Luchmunbutty* (1869) 12 W. R. 256; *Digambar* v. *Dhanraj* (1922) 1 Pat. 361, 67 I.C. 156, ('22) A. P. 96.

(*s*) *Sadu* v. *Ram* (1892) 16 Bom. 608; *Duri* v. *Tadepatri* (1910) 33 Mad. 246, 4 I.C. 392. See Code of Civil Procedure, O. 1, r. 10.

(*t*) *Sadu* v. *Ram* (1892) 16 Bom. 608; *Jotiram Ekoba* v. *Ramachendra Trimbak* (1941) Bom. 638, 197 I.C. 788, ('41) A.B. 382. See Code of Civil Procedure, O. 1, r. 10.

(*u*) *Digambar* v. *Dhanraj* (1922) 1 Pat. 361, 67 I.C. 156, ('22) A.P. 96.

(*v*) *Bishambhar Das* v. *Kanshi Prasad* (1932) 13 Lah. 483, 141 I.C. 45, ('32) A.L. 641.

(3) *Property to be comprised in a suit for partition.*—A suit for partition may be instituted— **S. 333**

(i) by a coparcener against the other coparceners ;

(ii) by the purchaser of the interest of a coparcener against his vendor and the other coparceners ;

(iii) against the purchaser of the interest of a coparcener by the other coparceners ;

(iv) by the purchaser of the interest of a coparcener in one of the several joint family properties against the purchaser of the interest of the other coparceners in the same property.

Whether a suit for partition should comprise all the joint family property, or whether it can be brought in respect of a portion only of the property, in other words, whether the suit should be one for *general partition*, or whether it can be one for a *partial partition* only, depends upon who the parties to the suit are—

(i) The general rule is that where a suit for partition is brought by a *coparcener* against the *other coparceners*, it should embrace the *whole* family property (*w*). This rule is subject to certain qualifications. Thus where a portion of the property is not available for actual partition (*x*) as being in the possession of a mortgagee (*y*), or where it is held jointly by the family with a stranger (*z*), a separate suit for partition may be brought in respect of that portion. Similarly, where part of the joint property consists of land situated outside the jurisdiction of the Court in which the suit for partition is brought, a separate suit may be brought in respect of that portion in the Court of the place where that portion is situated (*a*).

(*w*) *Nanabhai* v. *Nathabhai* (1870) 7 Bom. H.C. A.C. 46 ; *Trimbak* v. *Narain* (1874) 11 Bom. H.C. 69 ; *Ganpat* v. *Annaji* (1899) 23 Bom. 144 ; *Haridas* v. *Prannath* (1886) 12 Cal. 566. See Code of Civil Procedure, O. 2, rr. 1 and 2.

(*x*) *Pattaravy* v. *Audimula* (1870) 5 Mad. H.C. 419.

(*y*) *Narayan* v. *Pandurang* (1875) 12 Bom. H.C. 148 ; *Kristayya* v. *Narasimham* (1900) 23 Mad. 608.

(*z*) *Purushottam* v. *Atmaram* (1899) 23 Bom. 597 ; *Lachmi* v. *Janki* (1901) 23 All. 216 [where the property was the exclusive property of some of the coparceners only].

(*a*) *Subba* v. *Rama* (1867) 3 Mad. H.C. 376 [see Code of Civil Procedure, s. 16] ; *Punchanun* v. *Shibchunder* (1887) 14 Cal. 835 ; *Balaram* v. *Ramchandra* (1898) 22 Bom. 922 [see cl. 12, Letters Patent]. See also *Abdul Karim* v. *Badrudeen* (1905) 28 Mad. 216.

S. 333 *Hotchpot.*—A member of a joint family suing his coparceners for partition of family property is bound to bring into hotchpot, in order that there may be a complete and final partition, all family property that may be in his own possession (*b*), even though it be land situated beyond the local limits of the ordinary original jurisdiction of the Court in which the suit is brought (*c*), provided it is situated within British India (*d*).

(ii) The next case is where a coparcener sells his undivided interest in *one* of several properties belonging to the coparcenary, and a suit for partition is brought *by the purchaser* of such interest against *his vendor and the other coparceners*. In this case there is a conflict of decisions as to whether he can sue for partition of that property alone in which he is interested as a purchaser, or whether he should bring a suit for a general partition of all the family properties. This subject is dealt with in sec. 261 (*3*).

(iii) The third case is where a coparcener sells his undivided interest in one of several properties belonging to the coparcenary, and a suit for partition is brought by the other coparceners *against the purchaser*. As to the rights of the other coparceners in such a case, see sec. 261 (*3*).

(iv) The last case may be put in the form of an illustration. *A* and *B* are members of a joint family. The family property consists of three houses X, Y and Z. *A* sells his interest in house X to *C*. *B* sells his interest in the same house to *D*. In such a case *D* can sue *C* for partition of house X, without asking for a partition of houses Y and Z. *A* and *B*, no doubt, must be joined as defendants; but the real contest in this case is between strangers to the family, namely, *C* and *D*, and there is no reason why such contest should not be determined without reference to the remaining property of the family (*e*).

(*b*) *Ramlochun* v. *Rughoobur* (1871) 15 W.R. 111; *Lalljeet* v. *Rajcoomar* (1876) 25 W.R. 353.

(*c*) *Hari* v. *Ganpatrav* (1883) 7 Bom. 272; *Balaram* v. *Ramchandra* (1892) 22 Bom. 922, 928.

(*d*) *Ramacharya* v. *Anantacharya* (1894) 18 Bom. 389.

(*e*) *Subbarazu* v. *Venkataratnam* (1892) 15 Mad. 234; *Iburamasa* v. *Thirumalai* (1911) 34 Mad. 269, 7 I.C. 559.

Miscellaneous.

Ss. 334-336

334. Conversion and Partition.—Conversion of a member of a joint family to Mahomedanism (*f*), or to Christianity (*g*), or to any other religion, operates as a severance of the joint status as between him and the other members of the family, but not as a severance among the other members *inter se*. It extinguishes the right of survivorship as between the convert and his coparceners. He ceases to be a coparcener from the moment of his conversion, and is entitled to receive his share in the joint family property as it stood at the date of his conversion (*h*).

A member of a joint Hindu family does not by his conversion forfeit his interest in the joint family property. See sec. 97, ill. (a), and the Caste Disabilities Removal Act, 1850.

335. The Partition Act, 1893.—(*1*) Where in a suit for partition, it appears to the Court that a division of the property cannot reasonably or conveniently be made, and that a sale of the property and distribution of the proceeds would be more beneficial for all the shareholders, the Court may, if it thinks fit, on the request of any of such shareholders interested individually or collectively to the extent of one moiety or upwards, direct a sale of the property and a distribution of the proceeds.

(*2*) Where a share of a *dwelling house* belonging to an undivided family has been transferred to a person who is not a member of the family, it is open to any member of the family who is entitled to a share in the dwelling house to buy the share of the transferee at a valuation made by the Court.

This section reproduces the provisions of secs. 2 and 4 of the Partition Act, 1893.

335A. Covenant to pre-empt.—An agreement between two brothers at a partition that if one sharer wishes to sell his share in the house or if his share was sold in any other way the other sharer would be entitled to buy it at a certain amount is not void under section 14 of the Transfer of Property Act and is binding on the representative of the party (*i*).

VI.—RE-OPENING PARTITION.

336. Rights of sons.—A partition may be re-opened by an after-born son in the circumstances mentioned in ss. 309

(*f*) *Gobind* v. *Abdul* (1903) 25 All. 546, 573; *Ram Pergash* v. *Mussammat Dahan Bibi* (1924) 3 Pat. 152, 78 I.C. 749, ('24) A.P. 420.

(*g*) *Khunni Lal* v. *Gobind* (1911) 33 All. 356, 38 I.A. 87, 10 I.C. 477, on app. from 29 All. 487; *Kulada* v. *Haripada* (1913) 40 Cal. 407, 17 I.C. 257.

(*h*) *Kulada* v. *Haripada* (1913) 40 Cal. 407, 17 I. C. 257; *Vella Venkatasubbayya* v. *Vella Venkatramayya* (1944) Mad. 83.

(*i*) *Ratanlal* v. *Ramanujdas* (1945) Nag. 174.

Ss. 336-339

and 310 or a person validly adopted to a deceased coparcener (who if existing at the time of the partition would have been entitled to a share) by his widow after the partition (*j*).

Where in a partition between two brothers, one brother transferred a portion of his share to the other in consideration of the fact that the latter had discharged joint family debts out of his separate property, the son of the former cannot question the transfer (*k*).

337. **Fraud.**—A partition may be re-opened, if any coparcener has obtained an unfair advantage in the division of the property by fraud upon the other coparceners (*l*).

338. **Mistake.**—Where, after a partition has been made, it is discovered that property allotted to one of the coparceners did not belong to the family, but to a stranger, or that it was subject to a mortgage, the coparcener to whom such property has been allotted is entitled to compensation out of the shares of the other coparceners, and the partition may, if necessary, be re-opened for re-adjustment of the shares (*m*).

339. **Where a portion of joint property was excluded from partition.**—Where a portion of the joint property has been excluded from partition by mistake, accident or fraud, such portion continues to be the joint property of the family, and it must be divided amongst the persons who took under the partition (*n*). It is not necessary in such a case to re-open the original partition (*o*).

Finality of partition.—"*Once is the partition of inheritance made,* once is a damsel given in marriage; and once does a man say, 'I give'; these three are by good men done *once for all and irrevocably.*" *Manu*, IX, 47. Therefore, a partition once made cannot be re-opened except in the cases mentioned in the above sections. Where a partition is prejudicial to the interests of a minor coparcener, it may be set aside as regards himself; see sec. 308, sub-sec. (2).

Recovery by a member after partition of a debt due to the family.—*A* and *B* are members of a joint family. *A* and *B* divide the family property and separate. Some time after the partition, *C*, who owed Rs. 2,000 to the family, pays the amount to *A* alone. *B* sues *A* to recover his share of the amount. The suit must be brought within three years from the date of the receipt of the amount by *A*. The article of the Indian Limitation Act, 1908, applicable to such a case is art. 62, and not art. 127. The reason is that the amount recovered by *A after* partition is not *joint family property* and art. 127 therefore does not apply (*p*).

(*j*) *Sankaalingam Pillai* v. *Veluchami Pillai* (1943) Mad. 309, 205 I.C. 1, ('43) A.M. 43.

(*k*) *Ananthachari* v. *Krishnaswami* (1938) Mad. 410, 174 I.C. 590, ('38) A.M. 102.

(*l*) *Moro Vishvanath* v. *Ganesh* (1873) 10 Bom. H.C. 444, 451; *Lakshman* v. *Gopal* (1899) 23 Bom. 385.

(*m*) *Maruti* v. *Rama* (1897) 21 Bom. 333, *Purushottam* v. *Atmaram* (1899) 23 Bom. 385.

(*n*) *Jogendra* v. *Baladeb* (1907) 12 C.W.N. 127; *Bhowani* v. *Juggernath* (1908) 13 C.W.N. 309, 316; *Lachman* v. *Sanual* (1878) 1 All. 543; *Ganeshi Lal* v. *Babu Lal* (1918) 40 All. 374, 45 I.C. 4, ('18) A.A. 223.

(*o*) Celebrook's Digest, vol. III, p. 400.

(*p*) *Vaidyanatha* v. *Aiyasamy* (1909) 32 Mad. 191, 1 I.C. 408.

VII.—EFFECT OF PARTITION.

340. Devolution of share acquired on partition.—The effect of a partition is to dissolve the coparcenary, with the result that the separating members thenceforth hold their respective shares as their *separate* property, and the share of each member will pass on his death to his *heirs*. But if a member while separating from his other coparceners, continues joint with his own male issue, the share allotted to him on partition will in his hands retain the character of coparcenary property as regards the male issue [sec. 223, sub-sec. (*4*)]. **Ss. 340-342**

341. Whether separating son can inherit as an heir.—(*1*) It has been held by the High Courts of Bombay and Madras that on the death of a father leaving self-acquired property, an *undivided* son takes such property to the exclusion of a *divided* son. The Chief Court of Oudh has held that they both succeed to such property in equal shares [s. 43, nos. 1-3, note (3)].

(*2*) If, however, there is no undivided son, the divided son is entitled to succeed to such property in preference to his father's widow (*q*). See illustration.

(*3*) If the deceased dies leaving a *divided* son and a *divided* grandson by a predeceased son, the divided son does not exclude the divided grandson, but they succeed to the property in equal shares (*r*).

Propositions (2) and (3) proceed on the ground that partition does not destroy the filial relation nor the rights of inheritance incidental to such relation. This principle has been applied in Oudh as regards proposition (1) also, but not in Bombay and Madras.

Illustration.

A and his son *B* are members of an undivided family. *B* receives his share of the joint property, and separates from *A*. *A* then dies leaving a widow and his son *B*. *B*, as *A*'s son, is entitled to inherit to *A* in preference to the widow. The fact that *B* has separated from *A* does not interfere with his right of inheritance.

VIII.—REUNION.

342. Who may reunite.—"A reunion in estate properly so called can only take place between persons who were parties to the original partition" (*s*). It would appear from this that

(*q*) *Ramappa* v. *Sithammal* (1879) 2 Mad. 182; *Balkrishna* v. *Savitribai* (1879) 3 Bom. 54.

(*r*) *Marudayi* v. *Dorasami* (1907) 30 Mad. 348.

(*s*) *Balabun* v. *Rukhmabai* (1903) 30 Cal. 725, 734, 30 I.A. 130, 136; *Akshay* v. *Hari* (1908) 35 Cal 721; *Vishvanath* v. *Krishnaji* (1866) 3 Bom. H C.A.C. 69, *Lakshmibai* v. *Ganpat* (1867) 4 Bom. H C.O.C. 150, 166.

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a reunion can take place between *any* persons who were parties to the original partition. The Commentators, however, are not unanimous on this point. According to the Mitakshara (*t*), the Dayabhaga (Bengal School), and the Smriti Chandrika (Madras School), a member of a joint family once separated can reunite only with his father, brother or paternal uncle, but not with any other relation, as, for instance, paternal grandfather or paternal uncle's son, through such relation was a party to the original partition. According to the Vivada Chintamani (Mithila School) and the Mayukha (which is the paramount authority in Gujarat, the island of Bombay and the northern Konkan), a person may reunite with *any* relation who was a party to the original partition (*u*). Only males can reunite (*v*).

No writing is necessary for a reunion. Even persons who are parties to a registered deed of partition may reunite by an *oral* agreement (*w*).

The leading text on the subject is that of *Brihaspati*, which runs as follows:—

" He who being once separated dwells again through affection with his father, brother or paternal uncle, is termed reunited."

The conflict of opinion among the Commentators has arisen from the fact that some Commentators regard the list given in the above test as exhaustive, while others regard it as merely illustrative.

343. Effect of reunion.—The effect of a reunion is to remit the reunited members to their former *status* as members of a joint Hindu family (*x*). See sec. 60 and sec. 94.

The question whether there has been a reunion or not derives its importance from the fact that the devolution of the interest of a reunited member is governed by the special rules laid down in sec. 60 [Mitakshara law] and sec. 94 [Dayabhaga law].

344. Intention necessary to constitute reunion.—The mere fact that the parties who have separated live together or trade together after partition, does not amount to a reunion (*y*). To constitute a reunion, there must be an *intention* of the parties to *reunite in estate and interest* (*z*). Such an intention may be inferred if the parties jointly take a mortgage in which

(*t*) *Hira Singh* v. *Mst. Munglan* (1928) 9 Lah. 324, 106 I.C. 877, ('28) A. L. 122; *Ram Narain Choudhury* v. *Pan Kuer* (1935) 14 Pat. 268, 62 I.A. 16, ('35) A.PC. 9.

(*u*) *Basanta* v. *Jogendra* (1906) 33 Cal. 371 [Mitakshara]; *Vishvanath* v. *Krishnaji* (1866) 3 Bom. H.C.A.C. 69 at pp. 73, 74 [Mayukha]; *Balkishen Das* v. *Ramnarain* (1903) 30 Cal. 738, 753, 30 I.A. 139 [Dayabhaga]; *Abhai Churn* v. *Mangal* (1892) 19 Cal. 634, 638 [Dayabhaga].

(*v*) *Nanuram* v. *Radhabai* (1942) Nag. 24, ('40) A.N. 241.

(*w*) *Mahalakshmamma* v. *Suryanarayana* (1928) 51 Mad. 977, 117 I.C. 113, ('28) A.M. 1113.

(*x*) *Prankishen* v. *Mothoora Mohun* (1865) 10 M.I.A. 403, 406.

(*y*) *Ram Huree* v. *Trihee Ram* (1871) 15 W.R. 442; *Gopal* v. *Kenaram* (1867) 7 W.R. 35.

(*z*) *Balkrishen Das* v. *Ramnarain* (1903) 30 Cal. 738, 753, 30 I.A. 139, 150; *Jatti* v. *Banwari Lal* (1923) 50 I.A. 192, 74 I.C. 462, ('22) A.PC. 136.

it is recited that they are members of a joint family provided it is clearly shown that the recital is known to both the parties. If there is no such evidence it cannot be inferred that the parties have reunited (*a*). There can be no reunion unless there is an *agreement* between the parties to reunite in estate *with the intention* to remit them to their former *status* as member of a joint family (*b*). Since a minor is not competent to contract it follows, that an agreement to reunite cannot be made by, or on behalf of, a minor (*c*) [sec. 328, sub-sec. (*3*)].

Where the parties lived jointly but there was no reunion the ordinary law of inheritance applies. (*b*).

IX.—PARTITION CREATED BY SO-CALLED WILL.

345. Partition or family agreement created by so-called will.—(*1*) No member of a joint family, although he may be the head of the family, has a right to make a partition by will of *joint family property* among the members of the family except with their consent. A document, though called a will, may not be a will in fact, but one intended to operate from the date of its execution; such a document may be good evidence of a family arrangement contemporaneously made and acted upon by all parties, the effect of which may be to create a partition of the joint family property (*d*).

(*2*) Similarly no member of a joint family can dispose of even *his own share* by will. A document, though called a will, may not be a will in fact, but one intended to operate from the date of its execution; if a member of a joint family purports by such a document to dispose of his interest in the joint family property then if the disposition is assented to by the other members of the family, the document may be good evidence of a family arrangement, and effect will be given to the disposition so made (*e*).

Illustrations.

(1) By a document called a " will " the father and head of a joint family recorded a division of the joint family property amongst his 3 sons, giving himself no share, but allotting a double share to his eldest son. The document recited *inter alia* that he had divided the property among his sons in the proportions mentioned in it, and that in anticipation of the execution of the document the sons had been put into possession of their shares some 2 months previously. The evidence showed that the division had been

(*a*) *Govindoss* v. *Official Assignee of Madras* (1934) 57 Mad. 931, 61 I. A. 257, 150 I.C. 1, ('34) A.PC. 138.

(*b*) *Gokul Pati Datta* v. *Pashu Pati Nath Datta* (1942) 1 Cal. 85, 201 I.C. 642, ('42) A.C. 331.

(*c*) *Balabux* v. *Rukhmabai* (1903) 30 Cal. 725, 734-735, 30 I A 130, 136. See also *Kuta* v. *Kuta* (1864) 2 Mad H.C.A.C. 235

(*d*) *Brijraj Singh* v. *Sheodan Singh* (1913) 35 All 337, 40 I.A. 161, 19 I.C. 826

(*e*) *Lakshmichand* v *Anandi* (1926) 53 I A 123, 48 All. 313, 95 I C 556, ('26) A.PC. 54

S. 345 assented to, acquiesced in and acted upon by the sons for a period of 10 years. It was held that the document was not a will but was intended to operate from its date, and was evidence of a family arrangement contemporaneously made and acted upon by all the parties: *Brijraj Singh* v. *Sheodan Singh* (1913) 35 All. 337, 40 I.A. 161, 19 I.C. 826.

(2) Two brothers, having no male issue, and constituting a joint Hindu family governed by the Mitakshara, signed a document, described therein as an agreement by way of will. The document provided in effect that if either party died without male issue, his widow should take a life interest in a moiety of the whole estate, and that if both parties died without male issue, the daughters of each, or their male issue, should divide the father's share. The document was registered. A few days after its execution one brother died, and his widow was entered as owner of a moiety of the estate. Subsequently the other brother sued for a declaration that the document was null and void. It was held that the document could not operate as a will; but that, as a co-sharer in a Mitakshara joint family with the consent of all his co-sharers, could deal with the share to which he would be entitled on a partition, the document was an agreement entitling the widow of the deceased brother to a life interest in a moiety: *Lakshmichand* v. *Anandi* (1926) 53 I.A. 123, 48 All. 313, 95 I.C. 556, ('26) A.PC. 54.

CHAPTER XVII.

PARTITION

DAYABHAGA LAW.

346. Scope of the Chapter.—The object of the present chapter is to indicate the points of distinction between the Mitakshara and the Dayabhaga law of partition. Except as to those points, the rules of the Mitakshara law of partition apply *mutatis mutandis* to cases governed by the Dayabhaga law. **Ss. 346, 347**

See sec. 272 and the case there cited.

347. What is partition.—According to the true notion of a Mitakshara joint family no individual member of that family, whilst it remains undivided, can predicate of the joint property, that he—that particular member—has a certain definite share, one-third or one-fourth. Partition, according to that law, consists in *ascertaining and defining the shares* of the coparceners, in other words, it consists in a numerical division of the property by which the proportion of each coparcener in the property is fixed (s. 322).

According to the Dayabhaga law, on the other hand, each coparcener has, even whilst the family remains undivided, a *certain definite share* in the joint property of which he is the absolute owner. The property is held in defined shares, though the possession is the joint possession of the whole family. Partition, according to that law, consists in *separating* the *shares* of the coparceners, and assigning to the coparceners *specific portions of the property* (*f*).

As under the Mitakshara law, so under the Dayabhaga law, the true test of a partition lies in the *intention* of the parties to separate (s. 326). In the case of a joint Mitakshara family, that intention may be manifested by a mere agreement between the coparceners to hold and enjoy the property *in defined shares as separate owners* without an actual division of the property by metes and bounds (*g*) [s. 326]. In the case, however, of a joint Dayabhaga family, such an agreement as aforesaid is not a sufficient manifestation of the intention to separate ; for

(*f*) Dayabhaga, Chap. I, paras. 8-9.

(*g*) *Approvier* v. *Rama Subba Aiyan* (1866) 11 M.I.A. 75 ; *Balkrishen Das* v. *Ram Narain* (1903) 30 Cal. 738, 30 I.A. 139 ; *Parbati* v. *Naunihal* (1909) 31 All. 412, 36 I.A. 71, 3 I.C. 195.

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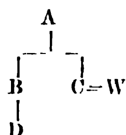
according to the Dayabhaga law the joint property is held, even while the family remains joint, in defined and specific shares. To constitute a partition according to the Dayabhaga law, there must be something more than such an agreement (*h*). There must be a *separation* of the shares, and the assignment to each coparcener of specific *portions* of the joint property [see s. 279].

348. Persons entitled to partition.—Under the Dayabhaga law, every adult coparcener, male or *female* (*i*) is entitled to enforce a partition of the coparcenary property.

As regards minor coparceners, a suit may be brought on their behalf for a partition in the circumstances mentioned in sec. 308 above.

Illustration.

A, a Hindu, governed by the Dayabhaga school, dies leaving two sons, *B* and *C*. On *A*'s death, *B* and *C* inherit the property left by *A as coparceners*. *B* dies leaving a son *D*. On *B*'s death, *D* inherits *B*'s share in the coparcenary property as *B*'s heir and he becomes a coparcener with *C*. *C* dies next leaving a widow *W*. On *C*'s death, *W* inherits *C*'s share in the coparcenary property as his heir, and she becomes a coparcener with *D*. The position at this stage is that we have a coparcenary consisting of two members, namely, *D* and *W*, the one a male, and the other a female (s. 277). *W* sues *D* for partition. Is she entitled to do so? Yes, and the Court will allot to her a moiety of the joint property both moveable and immoveable. But *W*, being a widow, is entitled to a widow's estate only (s. 174). The Court may, therefore, if there is a reasonable apprehension of waste by her of the *moveable* property allotted to her, make sufficient provision in the decree for the prevention of such waste, in order to safeguard the interest of the reversioner: *Durga Nath* v. *Chintamoni* (1904) 31 Cal. 214. [Note that in the case put above *D* is the next reversioner, he being *W*'s husband's nephew.]



Note that according to the Mitakshara law, a female cannot be a coparcener at all [s. 217].

As to who are coparceners, and what is coparcenary property, according to the Bengal school, see secs. 277 and 278 above.

349. Sons, grandsons and great-grandsons.—Under the Dayabhaga law a son is not entitled to a partition of the coparcenary property against his father. The reason is that a son, according to that law, does not acquire by birth any interest in ancestral property. The same rule applies to grandsons and great-grandsons [ss. 273-274].

According to the Dayabhaga law, there can be no coparcenary in the strict sense of the term between a father and sons, or between a grandfather and grandsons, or

(*h*) *Bata* v. *Gopal* (1907) 5 Cal. L. J. 417.

(*i*) *Durga Nath* v. *Chintamoni* (1904) 31 Cal. 214.

between a great-grandfather and great-grandsons. See note to sec. 277 above. Under that law, the father has absolute power of disposal of the property, whether ancestral or self-acquired. **Ss. 349-353**

350. Illegitimate sons.—According to all the schools, the illegitimate sons of the three regenerate classes [s. 1] are not entitled to any share of the inheritance nor to any share on partition. They are entitled to maintenance only.

As to the illegitimate sons of a Sudra see sec. 43, nos. 1-2-3, on pp. 35-38 above [as to inheritance] and sec. 312 [as to partition].

351. Purchaser.—Where a fractional share in a property which forms part of a joint estate has been sold, the purchaser may sue for partition of that property only and for possession of the share bought by him. without asking for partition of the whole joint estate (*j*).

Illustration.

A dies leaving two sons *B* and *C*. The family owns two immoveable properties X and Y. *B* sells his one-half share in X to *D*. *D* may sue for partition of X and for possession of a moiety thereof, without including property Y in the suit.

352. Wife.—According to the Mitakshara law, though a wife cannot herself demand a partition, she is entitled to a share on a partition between her husband and his sons [s. 315]. No such question can arise under the Dayabhaga law, for according to that law, a father is the absolute owner of his property whether ancestral or self-acquired, and the sons not being entitled to any interest in his property in his lifetime, cannot demand a partition against him [ss. 273-275].

Since a father, according to the Dayabhaga law, has absolute power of disposal over his property, whether ancestral or self-acquired, he may in his lifetime divide his property among his sons in such proportions as he likes. He is not bound to divide it equally between them, not even the ancestral property (*k*).

See the observations of Wilson, J., in *Sorolah* v. *Bhoobun* (*l*).

353. Mother.—(*1*) As under the Mitakshara law, so under the Dayabhaga law, a mother cannot herself demand a partition; but if a partition takes place between *her* sons, she is entitled to a share equal to that of a son after deducting the value of the *stridhana*, if any, which she may have received from her husband or father-in-law (*m*) [s. 316]. As to the Mitakshara law, see sec. 316.

(*j*) *Barahi* v. *Debkamini* (1893) 20 Cal. 682.

(*k*) See Bhattacharya's Hindu Law, 2nd edn., p. 361; Mitra's Law of Joint Property and Partition, p. 320.

(*l*) (1888) 15 Cal. 292, 306-307.

(*m*) *Kishori* v. *Moni Mohun* (1886) 12 Cal. 165; *Jogendra* v. *Fulkumari* (1900) 27 Cal. 77.

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(*2*) If a son dies before partition leaving the mother as his heir, the mother is entitled, upon a partition between her surviving sons, to receive a share as heiress of her deceased son, as well as a share in her own right. The share which she is entitled to receive as the heiress of her deceased son is not *stridhana*, for property inherited by a mother is not *stridhana* at all, and it is not therefore to be taken into account in determining the value of her share on partition (*n*) [ill. (a)].

(*3*) A Hindu governed by the Dayabhaga law may dispose of the whole of his property, ancestral as well as self-acquired, by will so as to deprive his widow of a share on a partition between her sons. The reason is that, according to that law, a widow has no indefeasible vested right in the property left by her husband. But if the whole property be willed away, she has, by virtue of her marriage, a right to maintenance out of her husband's property (*o*) [ill. (b)].

(*4*) Under the Dayabhaga law, a sonless step-mother is not entitled to a share on a partition between her step-sons (*p*) [ill. (c)].

(*5*) On a partition between sons by different mothers, where there is more than one son of each mother, the rule is first to divide the property into as many shares as there are sons, and then to allot to each mother a share equal to that of each of her sons in the aggregate portion allotted to them (*q*) [ill. (d)]. A mother who has only one son is not entitled to a separate share. Her only right is to maintenance out of the portion allotted to him (*r*) [ill. (e)].

(*6*) According to the Dayabhaga law, the share allotted to a mother on a partition between her sons is given to her in lieu of, or by way of provision for, her maintenance [s. 128 (*1*)]. Such being the case, she is not entitled to a share if a portion only of the joint property is divided and the bulk of the property remains undivided; provided that she can be adequately maintained from the undivided property (*s*).

(*n*) *Jugomohan* v. *Sarodamoyee* (1878) 3 Cal. 149; *Poorendranath* v. *Hemangini* (1909) 36 Cal. 75, 1 I.C. 523.

(*o*) *Debendra* v. *Brojendra* (1890) 17 Cal. 886; (1909) 36 Cal. 75, 1 I.C. 523, *supra*.

(*p*) *Srimati Hemangini* v. *Kedarnath* (1889) 16 Cal. 758, 765, 16 I.A. 115.

(*q*) *Kristo Bhabiney* v. *Ashutosh* (1886) 13 Cal. 39.

(*r*) (1889) 16 Cal. 758, 16 I.A. 115, *supra*; *Sorolah* v. *Bhoobun* (1888) 15 Cal. 292, 307.

(*s*) *Barahi* v. *Debkamini* (1893) 20 Cal. 682.

(7) The mere institution of a suit for partition by a son does not entitle the mother to a share in her husband's estate. If the suit is dismissed or withdrawn, she can claim no share. It is only if a decree is passed in the suit that she is entitled to a share. It follows that if one of the properties is mortgaged by the sons, and it is sold at the instance of the mortgagee before a decree for partition is passed, she is not entitled to any share in that property. Nor is she entitled by reason of the sale of the property to a larger share in the other properties. Whether she would be entitled to any charge for her maintenance on the property sold is an open question (*t*). **Ss. 353, 354**

Illustrations.

(a) *H* dies leaving a widow *A*, and three sons *B*, *C* and *D*. *B*, *C* and *D* remain joint, after some time *D* dies intestate and unmarried. On *D*'s death, *A* is entitled to his share as his heir [sec. 88]. A year after *D*'s death, *B* sues *C* and *A* for partition. The property will be divided into four shares of which one will be allotted to *B*, one to *C* and two to *A*, one as *D*'s heir and the other in her own right: *Jugomohan* v. *Sarodamoyee* (1877) 3 Cal. 149. [According to the Mitakshara law, *D*'s share would pass to *B* and *C* by survivorship.]

(b) *A* dies leaving a widow *B*, and two sons, *C* and *D*. *A* by his will bequeath the whole of his property, ancestral as well as self-acquired, absolutely to *C* and *D*. *C* sues *D* for partition. Is *B* entitled to a share at such partition? No: because the whole property has been willed away to the sons. She is entitled to maintenance only *Debendra* v. *Brojendra* (1890) 17 Cal. 886. [According to the Mitakshara law, *A* could not dispose of ancestral property by will.]

(c) *A* dies leaving a widow *B who has no son*, and two sons, *C* and *D*, by a predeceased wife. *C* sues *D* for partition. Is *B* entitled to share on partition? No, for *B* is not the mother, but the step-mother of *C* and *D*. [According to the Mitakshara law, *B* would take one-third: see sec. 316.]

(d) *A* dies leaving two widows, *B* and *C*, and two sons by *B*, and three sons by *C*. On a partition between the sons of *B* and *C*, the mode of division is first to divide the property into 5 shares corresponding to the number of sons. The two sons of *B* will share 2/5 equally with their mother *B*, each taking 1/3 of 2/5, *i.e.*, 2/15. The three sons of *C* will share 3/5 equally with their mother *C*, each taking 1/4 of 3/5, *i.e.*, 3/20. Thus *B* will take 2/15 and *C* will take 3/20.

(e) *A* dies leaving a widow *B*, a son *C* by *B*, and two sons, *D* and *E*, by a predeceased wife. *C* sues *D* and *E* for partition. Each of the three sons will take one-third. *B* is not entitled to share the one-third allotted to her son [*C*] with him as she has only one son. But she is entitled to maintenance out of the one-third allotted to her son *C*: *Hemangini* v. *Kedarnath* (1889) 16 Cal. 758, 16 I.A. 115.

354. Grandmother.—A grandmother (father's mother) cannot herself demand a partition but—

(*i*) if a partition takes place between her sons and grandsons, or between her sons and a predeceased

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(*t*) *Baldeodas* v. *Sarojini* (1930) 57 Cal. 597, 126 I.C. 408, ('29) A.C. 697.

Ss. 354, 355

son's daughter, who acquired a share as the heir of her father (*u*), she takes the share of a son ;

(ii) if a partition takes place between her grandsons, she takes the share of a grandson ; and

(iii) if a partition takes place between her grandsons and great-grandsons, she takes the share of a grandson (*v*).

In each case, if she has received any *stridhana* from her husband or her father-in-law, she is entitled to so much only as together with what she has already received would make her share equal to that of a son or grandson as the case may be (*w*).

Illustration.

A=B [1/3 as gr. mother.]
|
X=C [2/9 as mother.]
|
D [2/9] Y=E [nil.]
|
F [2/9]

A dies leaving a widow *B*, and a son *X*. *X* dies leaving a widow *C*, and two sons *D* and *Y*. *Y* dies leaving a widow *E* and a son *F*. *D*, who is *A*'s grandson, sues *F*, who is *A's great-grandson*, *B*, his *grandmother* *C*, his *mother*, and *E*, his brother's widow, for a partition of *A*'s property. Here the partition is really between *D*, *B*'s grandson and *F*, *B*'s great-grandson. Therefore *B*, as grandmother of *D*, is entitled to a share, equal to that of her grandson *D*. Similarly *C*, as *D*'s mother, is entitled to a share equal to that of her son *D*. What are the shares of *B* and *C*? As *B* is entitled to a share equal to that of a grandson, the property will first be divided into three parts of which *B* will take 1/3. *D* will take 1/3 and the heirs of *Y*, that is, *E* and *F* will take 1/3. Similarly as *C* is entitled to a share equal to that of a son and the portion allotted to the sons *D* and *Y* is 2/3, *C* will take 1/3 of 2/3, *i.e.* 2/9, *D* will take 2/9, and *F* will take 2/9. *E* is not entitled to share her son *F*'s 2/9 with him, for according to the Dayabhaga law, a mother who has only one son is not entitled to a share on partition (*x*).

355. Allotment of shares.—On a partition shares are allotted according to the following rules :—

(1) on a partition between brothers, they all take equally (*y*) ;

(2) the share of a brother who is dead is taken by his heir, devisee, or assignee ;

(3) each branch takes *per stirpes* (that is, according to the stock) as regards every other branch, but the members of a branch take *per capita* as regards one another.

(*u*) *Shibbosoondery* v. *Bussomutty* (1881) 7 Cal. 191.

(*v*) *Shibbosoondery* v. *Bussoomutty* (1881) 7 Cal. 191 ; *Purna Chandra* v. *Sarojini* (1904) 31 Cal. 1065.

(*w*) *Kishori* v. *Moni Mohun* (1886) 12 Cal. 165.

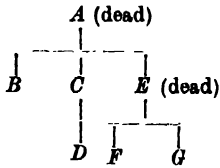
(*x*) *Ibid.*

(*y*) Dayabhaga, chap. iii, sec. 2, para. 27.

S. 355

Illustration.

A dies leaving two sons *B* and *C*, a grandson *D* by *C*, and two grandsons *F* and *G* by a predeceased son *E*. The property will be divided into three portions *per stirpes*, *B* taking one-third, *C* taking one-third, and *F* and *G* together taking the one-third belonging to *E*. *F* and *G* take *per capita*, that is, they share the third belonging to *E* equally between them, each taking one-sixth. *D* *takes nothing, for under the Bengal school sons do not take any interest in ancestral property during their father's lifetime.* [If *B* had died leaving a widow, his third would have gone to her (rule 2); according to the Mitakshara law, it would have passed by survivorship to *C* and *E*].



CHAPTER XVIII.

GIFTS.

Ss. 356, 357

356. "Gift" defined.—"Gift consists in the relinquishment (without consideration) of one's own right (in property) and the creation of the right of another; and the creation of another man's right is completed on that other's acceptance of the gift, but not otherwise."

Mitakshara, chap. 3, secs. 5 and 6. See sec. 358, and notes "Acceptance of gift."

357. What property may be disposed of by gift.—(*1*) A Hindu, whether governed by the Mitakshara or the Dayabhaga school, may dispose of by gift or will his *separate or self-acquired property*, subject in certain cases to the claims for maintenance of those whom he is legally bound to maintain [s. 222].

(*2*) A coparcener under the Dayabhaga law may dispose of his *coparcenary interest* by gift or will subject to the claims of those who are entitled to be maintained by him [s. 282].

A coparcener under the Mitakshara law, however, has no such power [s. 258], unless he is the sole surviving coparcener [s. 257].

(*3*) A *father* under the Dayabhaga law may by gift or will dispose of the whole of his property, whether *ancestral or self-acquired*, subject to the claims of those who are entitled to be maintained by him (*z*). The reason is that according to the Bengal School, "where property is held by the father [as the head of the family], his issue have no legal claim upon him or the property *except for their maintenance*. He can dispose of it as he pleases, and they cannot require a partition. The sons have not ownership while the father is alive and free from defect. Upon his death the property in the sons arises, and with it the right to a partition" (*a*) [ss. 273, 275]. A father under the Mitakshara law has no such power over joint family property. He cannot dispose of it, not even his own interest therein, by gift or will. In certain cases, however, he has a special power, by virtue of his position as father, to dispose of, by gift, a *small portion* of joint family property [ss. 225 and 226].

(*z*) *Nagalutchmee* v. *Gopoo* (1856) 6 M.I.A. 309, 344 [case of a will].

(*a*) *Rani Sartaj* v. *Deoraj* (1888) 10 All. 272, 288, 15 I.A. 51.

(4) A female may dispose of her *stridhana* by gift or will, subject in certain cases to the consent of her husband [s. 143]. Ss. 357, 358

(5) A widow may in certain cases by gift dispose of a *small portion* of the property inherited by her from her husband [s. 181B (2) (v)], but she cannot do so by will.

(6) A widow governed by the Mayukha law may alienate by gift *moveable* property inherited by her from her husband, though she cannot dispose of it by will [s. 179].

(7) The owner of an impartible estate may dispose of it by gift or will, unless there be a special custom prohibiting alienation or the tenure is of such a nature that the estate cannot be alienated (*b*).

Marumakkatayyam law.—As to the effect of a gift by a husband to his wife and her children by him, her children by her former husband being alive at the date of the gift, see the undermentioned case (*c*).

As to wills, see sec. 371 below.

358. Delivery of possession.—(*1*) A gift under pure Hindu law need not be in writing. But a gift under that law is not valid unless it is accompanied by delivery of possession of the subject of the gift from the donor to the donee (*d*). Mere registration of a deed of gift is not equivalent to delivery of possession; it is not therefore sufficient to pass the title of the property from the donor to the donee (*e*). But where from the nature of the case physical possession cannot be delivered, it is enough to validate a gift if the donor has done all that he could to complete the gift, so as to *entitle* the donee to *obtain* possession (*f*).

Illustrations.

(a) *A* executes a deed of gift of certain immoveable property to *B*. At the date of the gift the property is in the possession of *C* who claims to hold it adversely to *A*. *B* sues *C* to recover possession of the property from him, joining *A* in the suit as a defendant. *A* by his written statement *admits B's claim*. *C* contends that the gift is void, inasmuch as *A* was out of possession at the date of the gift, and possession was not given to *B*. The gift is valid, though possession was not delivered by the donor to the donee. Their Lordships of the Privy Council said: "But it must be observed that in this case the

(*b*) *Sartaj* v. *Deoraj* (1888) 10 All. 272, 15 I.A. 51; *Venkata Surya* v. *Court of Wards* (1899) 22 Mad. 383, 26 I.A. 83.

(*c*) *Moithiyan* v. *Ayissa* (1928) 51 Mad. 574, 110 I.C. 480, ('28) A.M. 870.

(*d*) *Harjivan* v. *Naran* (1867) 4 Bom. H.C. A.C. 31; *Abaji* v. *Mukta* (1894) 18 Bom. 688; *Venkatachella* v. *Thathammal* (1869) 4 Mad. H.C. 460. See also *Gordhandas* v. *Bai Ramcoover* (1902) 26 Bom. 449.

(*e*) *Vasudeo* v. *Narayan* (1883) 7 Bom. 131; *Dagai* v. *Mothura* (1883) 9 Cal. 854; *Lakshimoni* v. *Nittyananda* (1893) 20 Cal. 464.

(*f*) *Kalidas* v. *Kanhaya Lal* (1884) 11 Cal. 121, 11 I.A. 218 [where the gift was effected by an *ikrarnama*]; *Joitaram* v. *Ramkrishna* (1903) 27 Bom. 31; *Rajaram* v. *Ganesh* (1899) 23 Bom. 131; *Bhaskar* v. *Saraswatibai* (1893) 17 Bom. 486.

S. 358 dispute as to the validity of the gift is not between the donee and the donor or a person claiming under him. The person who disputes it claims adversely to both..........*The donor has done all that she can to complete the gift, and is a party to the suit, and admits the gift to be complete*" : *Kalidas* v. *Kanhaya Lal* (1885) 11 Cal. 121, 11 I.A. 218, followed in *Mahomed Buksh* v. *Hooseini Bibi* (*g*). See also *Man Bhari* v. *Naunidh* (*h*); *Muhammad Mumtaz* v. *Zubaida Jan* (*i*). *Mahomed Buksh*'s case and *Muhammad Mumtaz*'s case were both cases under Mahomedan law which, in this respect, is similar to pure Hindu law.

(b) A gift of property in the occupation of tenants may be completed by the tenants attorning to the donee at the donor's request: *Bank of Hindustan* v. *Premchand* (*j*).

(c) If the donee is already in possession, the gift may be completed by a declaration of gift on the part of the donor, and by acceptance on the part of the donee: *Bai Kushal* v. *Lakhma* (*k*).

(cl) A gift among the Hindus of Berar before the application of the Transfer of Property Act to that province is invalid unless accompanied by delivery of possession (*l*).

(d) It has been held by the High Court of Allahabad that mere delivery of a registered deed of gifts is sufficient to complete a gift (*m*). This view cannot be supported unless the case was one governed by the Transfer of Property Act [see sub-s. (2) below].

(e) For the purpose of making a gift of an incorporeal right, the transfer may be effected in the same manner as the transfer of a chose in action (*n*).

(*2*) As regards Hindu gifts to which the Transfer of Property Act, 1882, applies, the rule of pure Hindu law that delivery of possession is essential to the validity of a gift is abrogated by sec. 123 of that Act (*o*). Under that Act delivery of possession is no longer necessary to complete a gift, nor is mere delivery sufficient to constitute a gift except in the case of moveable property. A gift under that Act can only be effected in the manner provided by sec. 123. That section is as follows:—

(i) "For the purpose of making a gift of *immoveable* property, the transfer must be effected by a registered instrument signed by or on behalf of the donor, and attested by at least two witnesses.

(ii) "For the purpose of making a gift of *moveable* property, the transfer may be effected by a registered instrument signed as aforesaid or by delivery."

Gifts by Hindus to which the Transfer of Property Act, 1882, *applies.*—Sec. 123 of the Transfer of Property Act, 1882, has been applied to gifts by Hindus by sec. 129 of that Act.

(*g*) (1888) 15 Cal. 684, 701-702, 15 I.A. 81.

(*h*) (1882) 4 All. 40, 45.

(*i*) (1889) 11 All. 460, 475-476, 16 I.A. 205.

(*j*) (1868) 5 Bom. H.C. O.C. 83.

(*k*) (1883) 7 Bom. 452.

(*l*) *Chandrabhaga* v. *Anandarao* (1939) Nag. 293.

(*m*) *Balmakund* v. *Bhagwan Das* (1894) 16 All. 185.

(*n*) *Chalamanna* v. *Subbamma* (1884) 7 Mad. 23 [gift of a *nibandha* or corrody]; *Khurshedji Pestonji* (1888) 12 Bom. 573 [gift of Government Promissory Notes].

(*o*) *Kalyanasundaram* v. *Karuppa* (1927) 54 I.A. 89, 50 Mad. 193, 100 I.C. 105, ('27) A.PC. 42; *Atmaram* v. *Vaman* (1925) 49 Bom. 388 [F.B.], 87 I.C. 490, ('25) A.B. 210; *Dharmodas* v. *Nistarini* (1887) 14 Cal. 446; *Balbhadra* v. *Bhowani* (1907) 34 Cal. 853; *Bai Rambai* v. *Bai Mani* (1899) 23 Bom. 234; *Ramamirtha* v. *Gopala* (1896) 19 Mad. 433; *Alabi* v. *Mussa* (1901) 24 Mad. 513, 522; *Phulchand* v. *Lakkhu* (1903) 25 All. 358; *Lalu Singh* v. *Gur Narain* (1923) 45 All. 115, 68 I.C. 798, ('22) A. A. 467 [F.B.]; *Ranganadha* v. *Bhaghirathi* (1906) 29 Mad. 412, 415. But see *Moosabhai* v. *Yacoobhai* (1905) 29 Bom. 267. See also *Sadik Husain Khan* v. *Hashim Ali Khan* (1916) 43 I.A. 212, 222, 223, 38 All. 627, 647, 36 I.C. 104, ('16) A.PC. 27.

The Act came into force on the first day of July 1882. It extended in the first instance to the whole of British India *except* the territories respectively administered by the Governor of Bombay in Council, the Lieutenant-Governor of Punjab, and the Chief Commissioner of Burma. It was subsequently extended to the Bombay Presidency on the first day of January 1893, and, on the same date, to the area included within the local limits of the ordinary civil jurisdiction of the Recorder of Rangoon. The result is that the provisions of sec. 123 of the Transfer of Property Act apply to all gifts made by Hindus in the territories to which the Act applies since the date on which the Act came into force in those territories.

Writing.—Writing is not necessary under Hindu law for the validity of any transaction (*p*). Therefore, in cases of gifts by Hindus to which the Transfer of Property Act does not apply, a gift may be made orally or in writing.

Acceptance of gift.—" A gift," according to the Mitakshara, " consists in the relinquishment of one's own right and the creation of the rights of another. The creation of another man's right is *completed* on that other's *acceptance* of the gift, but not otherwise. Acceptance is made by three means, mental, verbal, or corporeal. In the case of *land*, as there can be no corporeal acceptance without enjoyment of the produce it must be accompanied by *some little possession, otherwise the gift, sale, or other transfer is not complete* " (*q*).

The effect of sec. 123 of the Transfer of Property Act is to dispense with delivery of possession (*r*). But the Act does not dispense with the necessity of *acceptance* as is clear from sec. 122. The mere execution of a registered deed by the donor is no proof of acceptance by the donee. Acceptance must be proved as an independent fact.

Gifts and bequests to unborn persons.—See secs. 360 and 373.

359. Gift to unborn person: Rule apart from statute.—Under pure Hindu law, a gift cannot be made in favour of a person who was not in existence at the date of the gift (*s*). This rule still applies to cases to which the provisions of the three Acts mentioned in the next section (sec. 360) do not apply.

For exception to this rule, see notes to sec. 372. As to bequests, see sec. 372. As to trusts, see sec. 366. As to gift to an idol, see sec. 410.

360. Gift to unborn person: Rule as altered by statute.—(*1*) The rule of Hindu law stated in sec. 359 that a gift cannot be made in favour of an unborn person has been altered by three Acts, namely, the Hindu Transfers and Bequests Act, 1914, the Hindu Disposition of Property Act, 1916, and the Hindu Transfers and Bequests [City of Madras] Act, 1921. The rule as altered by these Acts may be stated as follows :—

Subject to the limitations and dispositions contained in Chapter II of the Transfer of Property Act, 1882, *no gift is invalid*

(*p*) *Balaram* v. *Appa* (1872) 9 Bom. H. C. 121; *Hurpurshad* v. *Sheo Dyal* (1876) 26 W. R. 55, 3 I.A. 259.

(*q*) Mitakshara, chap. iii, secs. 5 and 6; W. MacN., 212, 217.

(*r*) *Dharmodas* v. *Nistarini* (1887) 14 Cal. 446, 448.

(*s*) *Tagore* v. *Tagore* (1872) 9 Beng. L. R. 377, 397, 400 I.A. Sup. Vol. 47, 67, 70; *Bai Mamubai* v. *Dossa* (1891) 15 Bom. 443, *Sree Raja Venkata* v. *Sree Rajah Suraneni* (1908) 31 Mad. 310.

S. 360 *by reason only that any person for whose benefit it may have been made was not born at the date of the gift.*

This rule, however, is not of universal application, but is confined to the following transfers, by way of gift :—

(i) to transfers executed *on or after the 14th February, 1914*, by Hindus domiciled *in the province of Madras except the City of Madras, and, in the case of transfers executed before that date*, to such of the dispositions thereby made as are intended to come into operation at a time which is subsequent to that Act: *Hindu Transfers and Bequests Act, 1914 ;*

(ii) to transfers executed *on or after the 20th September, 1916*, by Hindus *in any part of British India except the province of Madras : Hindu Disposition of Property Act, 1916 ;*

(iii) to transfers executed *on or after the 27th March, 1921*, by Hindus domiciled *within the limits of the ordinary original civil jurisdiction of the High Court of Madras*, and, in the case of transfers executed *before that date*, to such of the dispositions thereby made as are intended to come into operation at a time which is subsequent to the *14th February, 1914 : Hindu Transfers and Bequests [City of Madras] Act, 1921.*

(2) The limitations and provisions contained in Chapter II of the Transfer of Property Act, 1882, are discussed in secs. 383 to 387 below. For the present they may be summarised as follows : (a) if the gift to an unborn person is preceded by a prior disposition, the gift shall be of the whole residue ; (b) the gift shall not offend the rule against perpetuities ; (c) if a gift is made to a class of persons with regard to some of whom it is void under (a) or (b), the gift fails in regard to those persons only and not in regard to the whole class ; (d) if a gift to an unborn person is void under (a) or (b), any gift intended to take effect after such gift is also void.

History of the legislation on the subject.—It was held by the Privy Council in the *Tagore* case in 1872 that a Hindu cannot dispose of his property by gift in favour of a person who was not in existence at the date of the gift [sec. 359], nor could he dispose of his property by will in favour of a person who was not in existence at the date of the death of the testator [sec. 372]. The first enactment which validated gifts and bequests in favour of unbourn person was the Hindu Transfers and Bequests Act, 1914. This was an Act of the Madras Legislature. It applied in terms to the whole of the province of Madras and was intended so to apply. It was followed by Hindu Disposition of

Property Act, 1916, which was an Act of the Imperial Legislature. It applied to the whole of British India except the province of Madras for which legislation had already been made by the local Act, of 1914. After the Act of 1916 was passed, the High Court of Madras held as to the Madras Act of 1914 that the local Legislature had no power to take away the right of a Hindu domiciled within the local limits of the ordinary original civil jurisdiction of High Court of Madras to be governed by the Hindu law as it stood when the High Courts Act, 1861, was passed. The fact, however, was that the Hindu law as it then stood did allow gifts and bequests in favour of unborn persons, and the *Tagore* case had misinterpreted that law. This led to the enactment by the Imperial Legislature of the Hindu Transfers and Bequests [City of Madras] Act, 1921. This Act extends in effect the local Act of 1914 to Hindus domiciled in the City of Madras. It also validates gifts and bequests made by Hindus domiciled in the City of Madras subsequent to the 14th February 1914, being the date on which the local Act of 1914 came into force. The result is that as between them the Acts of 1914 and 1921 apply to the whole province of Madras, and the Act of 1916 applies to the rest of British India.

Gifts and bequests, however, in favour of unborn persons, could only be made subject to certain limitations and provisions. These limitations and provisions were not the same under the three Acts. To attain uniformity the three Acts were amended by the Transfer of Property (Amendment) Supplementary Act, being Act 21 of 1929, which came into force on the 1st April 1930. These limitations and provisions are more or less the same both in the case of gifts and of wills, and they are dealt with together in secs. 383 and 384. Except as to these, we have dealt separately with gifts and bequests in favour of unborn persons, not because there is any material difference between them, but because a separate treatment must conduce to a clear understanding of the subject. As to bequests to unborn persons, see sec. 373.

361. Reservation of life interest.—A gift of property is not invalid because the donor reserves the usufruct of the property to himself for life (*t*).

Illustration.

A executes a registered deed of gift of seven villages to her daughter, and delivers immediate possession of four villages to her. As to the remaining three villages the condition is that she will retain possession and enjoy the profits thereof during her life-time, but will not have power to make any transfer in respect thereof. The gift is valid not only as regards the four villages, but as to the other three also. There being an intention to effect a transfer *in praesenti* of the proprietary interest in all the seven villages and to vest the same in the donee, the reservation of the right to enjoy the usufruct on the three villages during her own life-time does not make the gift invalid as to the three villages: *Lallu Singh* v. *Gur Narain* (1923) 45 All. 115, 68 I.C. 798, ('22) A.A. 467 [F.B.].

362. Condition restraining alienation or partition.—Where property is given subject to a condition absolutely restraining the donee from alienating it (*u*), or it is given to two or more persons subject to a condition restraining them from parti-

(*t*) *Lallu Singh* v. *Gur Narain* (1923) 45 All. 115, 68 I.C. 798, ('22) A.A. 467 [F.B.].

(*u*) *Anantha* v. *Naga Muthu* (1882) 4 Mad. 200; *Ali Hasan* v. *Dhirja* (1882) 4 All. 518; *Bhairo* v. *Parmeshri* (1885) 7 All. 516 [case of a deed of compromise]; *Muthu kumara* v. *Anthony* (1915) 38 Mad. 867, 24 I.C. 120; *Rukminibai* v. *Laxmibai* (1920) 44 Bom. 304, 56 I.C. 361, ('20) A.B. 73 [Agrahar gift]. See Transfer of Property Act, s. 10.

tioning it (*v*), the condition is void, but the gift itself remains good [s. 393].

Illustration.

A makes a gift of property to *B* subject to the condition that he shall not alienate the property, but shall only enjoy the profits thereof. *B* is entitled to receive the property and dispose of it at his pleasure as if there were no such condition.

See in this connection the Crown Grants Act, 1895. Where a grant is made of land by the Crown, the land is to be held subject to the limitations and restrictions imposed by the grant.

363. Revocation of gift.—A gift once completed is binding upon the donor, and it cannot be revoked by him (*w*), unless it was obtained by fraud or undue influence (*x*).

Where a gift is made by a Hindu widow, the burden lies upon the donee to show that she made the gift which a full understanding of what she was doing and was aware of her rights (*y*).

364. Gift in fraud of creditors.—A gift made with intent to defeat or defraud creditors is voidable at the option of the creditors (*z*).

365. Donatio mortis causa.—A *donatio mortis causa*, that is, a gift made in contemplation of death, is recognized by the Hindu law (*a*).

366. Trusts.—(*1*) Trusts are no more strange to the Hindu than to the English system of law (*b*). Before the enactment of the Indian Trusts Act, 1882, a trust could only be created by delivery of possession, or its equivalent (*c*), to trustees as in the case of a gift. But a Hindu trust governed by the Act can only be created in the manner provided by sec. 5 of that Act. That section is as follows :—

(i) " No trust in relation to *immoveable* property is valid unless declared by a non-testamentary instrument in writing signed by the author of the trust or the trustee and registered, or by the will of the author of the trust or of the trustee.

(*v*) *Narayanan* v. *Kannan* (1884) 7 Mad. 315. Transfer of Property Act, s. 11.

(*w*) *Ganga Baksh* v. *Jagat Bahadur* (1896) 23 Cal. 15, 22 I. A. 153; *Rajaram* v. *Ganesh* (1899) 23 Bom. 131.

(*x*) *Manigavri* v. *Narandas* (1891) 15 Bom. 549.

(*y*) *Deo Kuar* v. *Man Kuar* (1894) 17 All. 1, 21 I.A. 148 [gift set aside—suit brought eight years after date of gift—document not explained to donor].

(*z*) *Nasir* v. *Mota* (1880) 2 All. 891; *Rai Bishenchand* v. *Mussamat Asmaida Koer* (1884) 6 All. 560, 11 I.A. 164.

(*a*) *Visalatchmi* v. *Subbu* (1871) 6 Mad. H.C. 270; *Bhaskar* v. *Saraswatibai* (1893) 17 Bom. 486, 495.

(*b*) *Tagore* v. *Tagore* (1872) 9 Beng. L.R. 377, 401-402 I.A. Sup. Vol. 47-71-72; *Sri Sri Sridhar Jew* v. *Manindra Kumar Mitra* (1940) 2 Cal. 285, 195 I.C. 475, ('41) A.C. 272.

(*c*) *Gordhandas* v. *Bai Ramcoover* (1902) 26 Bom. 449, 470-471.

(ii) "No trust in relation to *moveable* property is valid unless declared as aforesaid or unless the ownership of the property is transferred to the trustee" (*d*). S. 366

(*2*) A trust cannot be created except in favour of a person to whom a gift or bequest can be validly made. Nor can a trust be made a means of effecting a course of devolution opposed to the Hindu law of property and succession. In other words, trusts are to be regarded as *gifts* alike as to the property which can be transferred as to the persons to whom it can be transferred (*e*).

There is some authority for the proposition that under the Hindu law, in cases not governed by the Indian Trusts Act, 1882, a mere declaration of trust, not amounting to a legal transfer, can be enforced in favour of the object of the trust (*f*).

(*d*) *Ranganadha* v. *Bhaghirathi* (1906) 29 Mad. 412, 415.

(*e*) *Kahandas Narrandas, in re* (1881) 5 Bom. 154, 173-174; *Tagore* v. *Tagore* (1869) 9 Beng. L. R. 377, 401-402 I.A. Sup. Vol. 47, 71-72; *Rajender* v. *Shamchund* (1881) 6 Cal. 106.

(*f*) *Chatti* v. *Pandrangi* (1884) 7 Mad. 23; *Hirbai* v. *Jan Mahomed* (1883) 7 Bom. 229; *Bhaskar* v. *Saraswatibai* (1893) 17 Bom. 486, 498-501; *Gordhandas* v. *Bai Ramcoover* (1902) 26 Bom. 449, 472.

CHAPTER XIX.

WILLS.

S. 367 367. **Persons capable of making wills.**—Subject to the provisions hereinafter contained every Hindu who is of sound mind, and not a minor, may dispose of his property [s. 371] by will (*g*).

Burden of proof.—As regards the *onus* of proof in cases of wills the rules of law are quite clear. The first rule is, that "the *onus probandi* lies in every case upon the party propounding a will, and he must satisfy the conscience of the Court that the instrument so propounded is the last will of a free and capable testator." The second rule is, that "if a party writes or prepares a will under which he takes a benefit, or if any other circumstances exist which excite the suspicion of the Court, and whatever their nature may be, it is for those who propound the will to remove such suspicion, and to prove affirmatively that the testator knew and approved the contents of the will, and it is only where this is done that the *onus* is thrown on those who oppose the will to prove fraud or undue influence, or whatever they rely on to displace the case for proving the will (*h*)."

Wills unknown to pure Hindu law.—The idea of a will is wholly unknown to the pure Hindu law. But the testamentary power of Hindus has now long been recognized, and must be considered as completely established (*i*). In the undermentioned case (*j*) the Judicial Committee said: "It is too late to contend that, because the ancient Hindu treatises make no mention of wills, a Hindu cannot make a testamentary disposition of his property. Decided cases, too numerous to be now questioned, have determined that the testamentary power exists, and may be exercised, at least within the limits which the law prescribes to alienation, by gift *inter vivos*."

Joint will.—See note below "A document described as a will may not be a will."

To whom property may be bequeathed.—There is no objection to a bequest in favour of an infant, or an idiot, or a person who is disqualified from inheriting by reason of some personal disability (*k*). As to a bequest to an unborn person, see secs. 372—373 below.

Minor's will.—A Hindu who has not attained majority within the meaning of the Indian Majority Act, 1875, sec. 3, is not competent to make a will. See also the Indian Succession Act, 1925, sec. 2 (e), where the expression "minor" is defined.

A document described as a will may not be a will.—The expression "will" is defined in the Indian Succession Act, 1925, as the *legal* declaration of the intention of a testator *with respect to his property* which he desires to be carried into effect after his death. A document by which no property is disposed of, but which merely gives an authority to adopt, though described by the testator as a will, is not a will (*l*). Similarly, since a minor is not competent to make a will, any declaration by him with respect to his property

(*g*) *Hardwari* v. *Gomi* (1911) 33 All. 525, 9 I.C. 1017; *Bai Gulab* v. *Thakorelal* (1912) 36 Bom. 622, 17 I.C. 86; *Krishnamachariar* v. *Krishnamachariar* (1915) 38 Mad. 166, 19 I.C. 452, ('15) A.M. 815.

(*h*) *Larkho Bibi* v. *Gopi Narain* (1901) 23 All. 472; *Shama Charan* v. *Khettromoni Dasi* (1900) 27 Cal. 521, 27 I.A. 10; *Sukh Dei* v. *Kedar Nath* (1901) 23 All. 405, 28 I.A. 186; *Rash Mohini* v. *Umesh Chunder* (1898) 25 Cal. 824, 25 I.A. 109.

(*i*) *Soorjeemoney Dossey* v. *Denobundoo Mullick* (1862) 9 M.I.A. 123, 136.

(*j*) *Beer Pertab* v. *Rajender Pertab* (1867) 12 M.I.A. 1, 37-38.

(*k*) *Kooldeb Narain* v. *Wooma* (1864) Marshall 357.

(*l*) *Jagannatha* v. *Kunja* (1921) 48 I.A. 482, 44 Mad. 733, 64 I.C. 458, ('22) A.PC. 162.

cannot be said to be "legal" declaration, and the document comprising the declaration, though described as a will, is not a will at all (*m*).

Registration in Book not appropriate for wills.—Where it appears from the terms of a document and the circumstances in which it was executed that it is a will, the fact that it is registered in Book IV (Miscellaneous Register) kept under the Registration Act, 1908, instead of in Book III, is insufficient to outweigh those terms and those circumstances (*n*).

368. What property may be bequeathed by will.—(*1*) A Hindu cannot by will bequeath property which he could not have alienated by gift *inter vivos* [s. 357]; nor can he by will so dispose of his property as to defeat the legal right of his wife or any other person to maintenance (*o*).

See Indian Succession Act, 1925, Schedule III, paras. 1 and 2.

(*2*) As regards *property* which a Hindu can dispose of by will, the following propositions are to be noted:—

(i) According to all the schools a Hindu may dispose of by will his separate or self-acquired property (*p*) [s. 222].

(ii) According to the Dayabhaga law, a father may dispose of by will all his property, whether ancestral or self-acquired [s. 274]. Similarly a coparcener may dispose of by will the whole of his interest in the joint family property (*q*) [s. 282].

According to the Mitakshara law, no coparcener, not even a father, can dispose of by will his undivided coparcenary interest (*r*) even if the other coparceners consent to the disposition. The reason is that "at the moment of death the right of survivorship [of the other coparceners] is in conflict with the right by devise. Then the title by survivorship, being the prior title, takes precedence to the exclusion of that by devise" (*s*). A sole surviving coparcener may, however, bequeath the joint family property as if it were his separate property (*t*). A *will* operates from

(*m*) *Kondapalli Vijayaratnam* v. *Mandapaka Sudarsana Rao* (1925) 52 I.A. 305, 48 Mad. 614, 89 I.C. 733, ('25) A.PC. 196.

(*n*) *Krishna Rao* v. *Sundara Siva Rao* (1931) 58 I. A. 148, 54 Mad. 440, 131 I. C. 318, ('31) A.PC. 109.

(*o*) *Sonatun* v. *Juggutsoondree* (1859) 8 M.I.A. 66-88; *Beer Pertab* v. *Rajender Pertab* (1867) 12 M.I.A. 1, 38; *Promothanath* v. *Nagendrabala* (1908) 12 C.W.N. 808.

(*p*) (1867) 12 M.I.A. 1, 38, *supra*.

(*q*) *Nagalutchmee* v. *Gopoo* (1856) 6 M.I.A. 309, 344; *Rani Sartaj* v. *Deoraj* (1888) 10 All. 272, 288, 15 I.A. 51.

(*r*) *Vitla Butten* v. *Yamenamma* (1874) 8 Mad. H.C. 6; *Lakshman* v. *Ramchandra* (1881) 5 Bom. 48, 7 I.A. 181; *Harilal* v. *Bai Mani* (1905) 29 Bom. 351; *Lalta Prasad* v. *Sri Mahadevji* (1920) 42 All. 461, 58 I.C. 667, ('20) A.A. 116.

(*s*) *Vitla Butten* v. *Yamenamma* (1874) 8 Mad. H.C. 6; *Lakshmi Chand* v. *Annandi* (1926) 53 I.A. 123, 48 All. 313, 95 I.C. 566, ('26) A.PC. 54; *Bhikhabai* v. *Purshottam* (1926) 50 Bom. 558, 96 I.C. 421, ('26) A.B. 378 [will though made with consent of son held void]; *Anandrao* v. *Administrator General of Bombay* (1896) 20 Bom. 450 explained; *Subbarami* v. *Ramamma* (1920) 43 Mad. 824, 59 I.C. 681, ('20) A.M. 637.

(*t*) *Nagalutchmee* v. *Gopoo Naduraja* (1856) 6 M.I.A. 309; *Narottam* v. *Narsandas* (1866) 3 Bom. H.C.A.C. 6.

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the date of the testator's death ; therefore, if a coparcener subsequently comes into existence such as a son adopted by him (*u*), a son subsequently born to him (*v*), including a posthumous son (*w*) or the posthumous son of a deceased coparcener, the will, so far as it deals with the coparcenary property, will be inoperative and the property will pass to him by *survivorship*. But if the son whether natural born or adopted dies in the lifetime of the testator, the will stands, and the devisee is entitled to the property given to him by the will (*x*).

Having regard to the consensus of judicial decisions, an arrangement in a will made before the adoption whereby the widow of the adoptive father is to enjoy his property during her lifetime, or for a less period, that arrangement being consented to by the natural father before the adoption, is to be regarded as valid by custom. But an agreement or consent by the natural father is not effectual in law or by custom to validate any other disposition of the property in a will which is to take effect after the adoption and will curtail the rights of the adopted son as co-sharer. Consequently a will by which a sole surviving coparcener gave part of the coparcenary property to his intended adopted son, part to his widow for life, part to kindred, and part to charity is not binding upon the adopted son, although before the adoption took place the natural father executed a deed by which he consented to the provisions of the will and gave his son in adoption subject thereto (*y*). See s. 374.

Though a father may dispose of a small portion of ancestral *moveables* by way of *gift*, he cannot do so by *will* (*z*) [ss. 225, 226].

(*u*) *Venkatanarayana* v. *Subhamal* (1915) 43 I.A. 20, 39 Mad. 107, 32 I.C. 373, ('15) A.PC. 37; *Perma Nand* v. *Shiv Charan Das* (1921) 2 Lah. 69, 59 I.C. 256, ('21) A.L. 147; *Villa Butten* v. *Yamenamma* (1874) 8 Mad. H.C. 6.

(*v*) *Lalita Devi* v. *Ishar Das* (1933) 14 Lah. 178, 138 I.C. 58, ('33) A.L. 544.

(*w*) *Hanmant* v. *Bhimacharya* (1888) 12 Bom. 105; *Minakshi* v. *Virappa* (1888) 8 Mad. 89.

(*x*) *Bodi* v. *Venkataswami* (1915) 38 Mad. 369, 21 I.C. 73, ('15) A.M. 1077.

(*y*) *Krishnamurthi* v. *Krishnamurthi* (1927), 54 I.A. 248, 50 Mad. 508, 101 I.C. 779, ('27) A.PC. 139; *Lakshmi* v. *Subramanya* (1889) 12 Mad. 490; *Narayanasami* v. *Ramasami* (1891) 14 Mad. 172.

(*z*) *Parvatibai* v. *Bhagwant* (1915) 39 Bom. 593, 31 I.C. 280, ('15) A.B. 265; *Subbarami* v. *Ramamma* (1920) 43 Mad. 824, 59 I.C. 681, ('20) A.M. 637; *Patra Chariar* v. *Srinivasa* (1917) 40 Mad. 1122, 40 I.C. 118, ('18) A.M. 531 [where the other coparceners had consented to the bequest].

(iii) A Hindu female may dispose of her *stridhana* by will, subject in certain cases to the consent of her husband [s. 143]. Ss. 368, 369

(iv) The owner of an impartible estate may dispose of it by will, unless there be a special custom prohibiting alienation, or the tenure is of such a nature that it cannot be alienated (*a*).

(v) Summarising the above, it may be said that that property alone can be disposed of by will which can be alienated by gift *inter vivos*. But it does not follow that every kind of property that can be alienated by gift can be disposed of by will. Thus a widow governed by the Mayukha may alienate by gift *moveable* property inherited by her from her husband, but she cannot dispose of it by will [s. 179].

Maintenance.—A Hindu governed by the Dayabhaga law can by his will deprive his wife of the share which she would get on a partition between her sons; but the wife is in that case entitled to an adequate provision for her maintenance out of her husband's estate [s. 353].

Disinheritance.—There is nothing to prevent a Hindu from so disposing of his property by will as to defeat the rights of his sons, wife, or other heirs even to the extent of completely disinheriting them (*b*). No express words are necessary to disinherit the heirs; it is sufficient if the property is bequeathed to some other person (*c*). But if the bequest to that person is not valid, there will be an intestacy to that extent, and the property will go to the heir, notwithstanding express directions in the will that he shall not take. The estate must go to somebody, and if there is no valid disposition, it must go to the heir (*d*). Similarly, where under the terms of a will the *corpus* of the estate is not to vest until the happening of a certain event, it will *in the meantime* vest in the heir (*e*).

Adopted son.—A Hindu adopting a son does not thereby deprive himself of the power to dispose of his *separate* property by will. There is no implied contract on the part of the adopter that he would not, in consideration of the gift of his son by the natural father, dispose of his property by will (*f*), but he cannot dispose of *ancestral* property by will (*g*).

369. Section 57 of the Indian Succession Act, 1925.—The Indian Succession Act, 1925, consists of eleven parts. Part VI relates to testamentary succession and comprises

(*a*) *Sri Raja Venkata Surya* v. *Court of Wards* (1899) 22 Mad. 383, 26 I.A. 83 [will]; *Sartaj* v. *Deoraj* (1888) 10 All. 272, 15 I.A. 51 [gift].

(*b*) *Mulraz* v. *Chalekany* (1838) 2 M.I.A. 54; *Subbayya* v. *Surayya* (1887) 10 Mad. 251; *Narottam* v. *Narasandas* (1866) 3 Bom. H. C.A.C. 6.

(*c*) *Prosunno* v. *Tarrucknath* (1873) 10 Beng. L. R. 267.

(*d*) *Tagore* v. *Tagore* (1872) 9 Beng. L.R. 377, 402.

(*e*) *Amulya* v. *Kali Das* (1905) 32 Cal. 861.

(*f*) *Sri Raja Venkata Surya* v. *Court of Wards* (1899) 22 Mad. 383, 26 I.A. 83.

(*g*) *Parmanand* v. *Shiv Charandas* (1921) 2 Lah. 69, 59 I.C. 256, ('21) A.L. 147.

Ss. 369, 369A secs. 57 to 191. Of these only some apply to Hindu wills, being those mentioned in Schedule III to the Act. But these, again, do not apply to all Hindu wills, but only to such classes of wills as are specified in sec. 57 of the Act. The section is as follows :—

"The provisions of this Part (that is, Part VI of the Act) which are set out in Schedule III shall, subject to the restrictions and modifications specified therein, apply—

(a) to all wills and codicils made by any Hindu, Buddhist, Sikh, or Jain, *on or after the* 1*st day of September*, 1870, within the territories which at the said date were subject to the Lieutenant-Governor of Bengal or within the local limits of the ordinary original civil jurisdiction of the High Courts of Judicature at Madras and Bombay;

(b) to all *such* wills and codicils made outside those territories and limits so far as relates to immoveable property situate within those territories or limits; and

(c) to all wills and codicils made by any Hindu, Buddhist, Sikh, or Jain, *on or after the* 1*st day of January*, 1927, to which those provisions are not applied by clauses (a) and (b)."

369A. Form of will.—The following Hindu wills and codicils are required to be in writing signed by the testator and attested by at least two witnesses (*h*), as provided by sec. 63 of the Indian Succession Act, 1925, namely :—

(a) all wills and codicils made by any Hindu, Buddhist, Sikh, or Jain, *on or after the* 1*st day of September*, 1870, within the territories which at the said date were subject to the Lieutenant-Governor of Bengal or within the local limits of the ordinary original civil jurisdiction of the High Courts of Judicature at Madras and Bombay;

(b) all *such* wills and codicils made outside those territories and limits so far as relates to immoveable property situate within those territories or limits; and

(c) all other wills and codicils made by any Hindu, Buddhist, Sikh, or Jain, *on or after the* 1*st day of January*, 1927.

This section is but a limb of sec. 57 of the Indian Succession Act, 1925: see sec. 369 above.

(*h*) *Umakanta* v. *Biswambhar* (1929) 8 Pat. 413, 117 I.C. 874, ('29) A.P. 401.

Before the Hindu Wills Act, 1870, no Hindu will was required to be in writing; the will could be oral or in writing (*i*). If the will was in writing, it did not require to be signed or attested (*j*). Probate was granted of oral wills as well as of written wills (*k*) The Hindu Wills Act was the first enactment which required Hindu wills to be in writing. That Act, however, applied to certain wills only, being those specified in cls. (a) and (b) of this section. Other wills were not required to be in writing. They could be made orally. By the Indian Succession (Amendment) Act, 1926, those wills also were required to be in writing. This Act is reproduced in cl. (c) of this section. The result is that every Hindu will made after the 1st January, 1927, must be in writing signed by the testator and attested by at least two witnesses as provided by sec. 63 of the Indian Succession Act, 1925. As to the history of the legislation on the subject, see p. 434 of the 8th Ed. of this work.

No particular form necessary for a will.—A will need not be in any particular form. It is sufficient if it contains the testamentary wishes of the deceased. Thus a petition to the Revenue authorities (*l*), a statement made before a Revenue official and recorded by him (*m*), entries in a *wajib-ul-arz* (*n*), a matrimonial arrangement deed (*o*), a *mooktiar-namah* or power of attorney (*p*), a deed of settlement made at the time of adoption (*q*), and a *tamlikanama* or deed of assignment (*r*), containing testamentary dispositions of property, have been held to amount to a will.

370. Revocation of will: alterations in will.—(*1*) No will or codicil specified in cls. (a) and (b) of sec. 369A above can be revoked except in the manner provided by sec. 70 of the Indian Succession Act, 1925. Nor can it be altered except in the manner provided by sec. 71 of the Act.

(*2*) The above rule applies also to wills and codicils specified in cl. (c) of sec. 369A, but only to such revocation and alterations as are made on or after the 1st October, 1929.

(*3*) The will of a Hindu is not revoked by the marriage of the maker thereof (*s*), nor is it revoked, as regards self-acquired property, by the subsequent birth or adoption of a son (s. 498).

This section is another limb of sec. 57 of the Indian Succession Act, 1925, set out in sec. 369 above.

Rule of Hindu law before legislation.—No writing was necessary under the Hindu law to make a will or to revoke a will. Nor was actual destruction of a will necessary to constitute a revocation, if definite authority was given by the testator to destroy it with the intention of revoking it (*t*).

As to the history of the legislation on the subject, see p. 434 of the 8th Ed. of the work.

(*i*) *Hari* v. *Moro Lakshman* (1887) 11 Bom. 89, 93; *Bhagwan* v. *Kala* (1877) 1 Bom. 641.

(*j*) *Tarachand* v. *Nobeen Chunder* (1865) 3 W.R. 138; *Radhabai* v. *Ganesh* (1879) 3 Bom. 7; *Bapuji Jagannath, in re* (1896) 20 Bom. 674; *Janki* v. *Kallu Mal* (1909) 31 All. 236, 2 I.C. 213 [draft will].

(*k*) *Gokul Chand* v. *Mangalsan* (1903) 25 All. 313

(*l*) *Mahomed Shamsool* v. *Shewukram* (1874) 14 Beng. L.R. 226, 2 I.A. 7.

(*m*) *Kalian Singh* v. *Sanwal Singh* (1885) 7 All. 163.

(*n*) *Mathura Das* v. *Bhikhan Mal* (1897) 19 All. 16.

(*o*) *Din Tarini* v. *Krishna* (1909) 36 Cal. 149, 1 I.C. 791.

(*p*) *Kollanay* v. *Luchmee* (1875) 24 W.R. 395.

(*q*) *Lakshmi* v. *Subramanya* (1889) 12 Mad. 490

(*r*) *Thakur Ishri Singh* v. *Baldeo Singh* (1884) 10 Cal. 792, 11 I.A. 135.

(*s*) Indian Succession Act, 1925, s. 57.

(*t*) *Maharajah Pertab Narain* v. *Subhao Kooer* (1877) 3 Cal. 626, 643, 4 I.A. 228, 245; *Venkayyamma* v. *Venkataramanayyamma* (1902) 25 Mad. 678, 29 I.A. 156.

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371. Wills founded on the law of gifts.—Bequests stand substantially on the same footing as gifts (*u*). It has been so laid down by their Lordships of the Privy Council in the *Tagore* case. In that case their Lordships said :—" Even if wills are not universally to be regarded in all respects as gifts to take effect upon death, they are *generally* so to be regarded as to the *property* which they can transfer, and the *persons* to whom it can be transferred " (*v*).

"*Property which they can transfer.*"—That property alone can be bequeathed by will which can be alienated by gift *inter vivos* : see secs. 357 and 368.

"*Persons to whom it can be transferred.*"—Just as before the Acts referred to in sec. 360 a gift could not be made in favour of a person who was not in existence at the date of the gift, so a bequest could not before those Acts be made in favour of a person who was not in existence at the testator's death. See secs. 372, 373.

372. Bequest to unborn person: Rule apart from statute.— A person capable of taking under a will must, either in fact or in contemplation of law, be in existence at the death of the testator (*w*). This rule still applies to cases to which the provisions of the three Acts mentioned in the next section (s. 373) do not apply.

Child in the womb.—A bequest to a person not in existence *at the testator's death* is invalid. A child in the womb and a son adopted by a widow after the death of her husband are *in contemplation of law* in existence at the death of the testator.

A bequest to the wife of the testator's son in case he should marry within ten years from the testator's death is valid, provided the son marries a girl who was in existence at the testator's death (*x*), as the rule in this section does not apply.

Illustration.

A bequest to the eldest child of *L* takes no effect if *L* has no child, at the time of the death of the testator, even though *L* has a son born some time after the testator's death (*y*). The decision is also based on another ground.

Exceptions to the rule.—In laying down the above rule in the *Tagore* case the Judicial Committee desired " not to express any opinion as to certain exceptional cases of provisions by means of *contract* or of *conditional gift on marriage* or *other family provision* for which authority may be found in Hindu law or usage." Thus where a suit against a Hindu widow by a person claiming to be the adopted son of her husband was compromised by an agreement which provided that on the plaintiff relinquishing his claim to a zemindari, the widow and her heirs holding the zemindari should pay a specified annuity to the plaintiff and *his heirs from generation to generation*, it was held by their Lordships of the Privy Council that the annuity was a charge upon the estate, and the agreement was enforceable against the widow's successors. Dealing with the argument that the grant was void as offending against the rule against perpetuity, their Lordships said: " A

(*u*) *Seth Mulchand* v. *Bai Mancha* (1883) 7 Bom. 491, 493.

(*v*) *Tagore* v. *Tagore* (1872) 9 Beng. L.R. 377, 399 I.A. Sup. Vol. 47, 69; *Motivahu* v. *Mamubai* (1897) 21 Bom. 709, 721, 24 I. A. 93, 105.

(*w*) *Tagore* v. *Tagore* (1872) 9 Beng. L.R. 377, 397, 400 I.A. Sup. Vol. 47, 67, 70; *Chandi Churn* v. *Sidheswari* (1889) 16 Cal. 71, 15 I.A. 149; *Venkata* v. *Suraneni* (1908) 31 Mad. 310; *Bai Mamubai* v. *Dossa* (1891) 15 Bom. 443.

(*x*) *Dinesh Chandra* v. *Biraj Kamini* (1912) 39 Cal. 87, 11 I.C. 67.

(*y*) *Nakshetrawali Devi* v. *Brajsunder Das* (1933) 12 Pat. 708, 146 I.C. 865, ('33) A.P. 647.

second contention was that this was a creation of a kind of perpetuity, which the law did not allow, or an attempt to create a permanent relation which was impossible of creation. Whatever might be said about that, if this agreement lay in covenant, seeing that it lies in a *charge*, there is no difficulty in making it perpetual as long as there are lineal or collateral heirs of the grantee, and in our view the District Judge and Seshagiri Aiyar, J., in the High Court were right in holding that this is a charge" (z). It has also been held that an annuity left by a Hindu to his daughter for her life, and then to her son absolutely —the annuity having been made a *charge* on the estate—is valid, though the son might be born after the death of the testator. A grant of this description does not violate the rule against perpetuity (a).

The rule in this section applies to the office of a Shebait and a direction in the will that the office should be held by an unborn person was held to be invalid (b).

The rule laid down in this section is applicable to all wills, whether they are governed by the Dayabhaga law or the Mitakshara law (c), and whether they are or are not subject to the provisions of the Indian Succession Act, 1925, relating to Hindu wills (d). It may here be observed that the testator in the *Tagore* case was governed by the Dayabhaga school, and the will was made long before the Hindu Wills Act, 1870, came into force. As to the law as altered by statute, see s. 373.

373. Bequest to unborn person : Rule as altered by statute.—(*1*) The rule of Hindu law stated in sec. 372 that a bequest cannot be made in favour of a person who was not born at the date of the testator's death has been altered by three Acts, namely, the Hindu Transfers and Bequests Act, 1914, the Hindu Disposition of Property Act, 1916, and the Hindu Transfers and Bequests [City of Madras] Act, 1921. The rule as altered by these Acts may be stated as follows :—

Subject to the limitations and provisions contained in sections 113, 114, 115 and 116 of the Indian Succession Act, 1925, no bequest shall be invalid by reason only that any person for whose benefit it may have been made was not born at the date of the testator's death.

This rule, however, is not of universal application, but is confined to the following cases, namely :—

(i) to wills executed *on or after the 14th February 1914*, by Hindus domiciled *in the province of Madras except the city of Madras*, and, in the case of wills executed *before that date*, to such of the dispositions thereby made as are intended to come into operation at a time which is

(z) *Raja of Ramnad* v. *Sundara* (1919) 46 I.A. 64, 42 Mad. 581, 49 I.C. 704, ('18) A.PC. 156. See also *Khajeh Solehman Quadir* v. *Nawab Sir Salimullah* (1922) 49 I.A. 153, 49 Cal. 820, 69 I.C. 138, ('22) A.PC. 107.

(a) *Jatindra* v. *Ghanashyam* (1923) 50 Cal. 266, 72 I.C. 1019, ('23) A.C. 27.

(b) *Manohar Mukherji* v. *Bhupendranath Mukherji* (1933) 60 Cal. 452, 141 I.C. 544, ('32) A.C. 791 overruling *Mathura Nath* v. *Lakhi Narain* (1923) 50 Cal. 426, 75 I.C. 435, ('24) A.C. 68.

(c) *Mangaldas* v. *Krishnabai* (1882) 6 Bom. 38.

(d) *Alangamonjori* v. *Sonamoni* (1882) 8 Cal. 637; *Radha Prasad* v. *Ranimoni Dasi* (1911) 38 Cal. 188, 8 I.C. 1061, S.C. on appeal, 41 Cal. 1007, 41 I.A. 176, 23 I.C. 713, ('14) A.PC. 149.

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subsequent to that date: *Hindu Transfers and Bequests Act, 1914;*

(ii) to wills executed *on or after the 20th September, 1916*, by Hindus *in any part of British India except the province of Madras: Hindu Disposition of Property Act, 1916;*

(iii) to wills executed *on or after the 27th March, 1921*, by Hindus domiciled *within the limits of the ordinary original civil jurisdiction of the High Court of Madras*, and, in the case of wills executed *before that date*, to such of the dispositions thereby made as are to come into operation at a time subsequent to the 14th February, 1914: *Hindu Transfers and Bequests [City of Madras] Act, 1921.*

For the three Acts mentioned in the section and the history of the legislation on the subject, see notes to sec. 360 above.

The limitations subject to which a bequest can be made in favour of an unborn person are set out in secs. 383-387 below.

374. Election.—Though a Hindu governed by the Mitakshara law cannot dispose of by will his undivided interest in coparcenary property, he may bequeath his self-acquired property to his coparcener and his undivided interest in the coparcenary property to a third person. Such a disposition is valid, and the coparcener to whom the self-acquired property is bequeathed will have to elect, after the testator's death, as to which of the two properties he would take. He cannot have both (*e*).

375. Probate, letters of administration and succession certificate.—(*1*) In the case of Hindu wills of the classes specified in clauses (a) and (b) of sec. 57 of the Indian Succession Act, 1925, [s. 369 above], no right as executor or legatee can be established in a Court of Justice, unless a Court of competent jurisdiction shall have granted probate of the will. But no probate is necessary to establish such right in the case of other Hindu wills (*e1*).

(*2*) Where a Hindu dies intestate, it is not necessary *in any case* to obtain letters of administration to the estate of the deceased to establish a right to any part of the property of the deceased.

(*3*) But where the suit is one to recover a *debt* due to the estate of a deceased Hindu, no decree can be passed against

(*e*) *Kishun Chand* v. *Narinjan* (1929) 10 Lah. 389, 113 I. C. 298, (28) A. L. 967.

(*e1*) *Ahmed* v. *Ghisia* (1945) Nag. 562, ('45) A.N. 237.

the debtor except on the production of a probate or letters of administration or a succession certificate. Ss. 375, 376

Sub-sec. (1).—Sub-sec. (*1*) is a re-production of sec. 213 of the Indian Succession Act, 1925. Where probate is necessary to establish a claim in a Court of law, it is sufficient if the probate is produced when the decree is passed. The suit may be *instituted* without a probate (*f*).

Sub-sec. (2).—See the Indian Succession Act, 1925, sec. 212.

Sub-sec. (3).—This sub-section is a reproduction of sec. 4 of the Succession Certificate Act, 1889, now the Indian Succession Act, 1925, sec. 214. A succession certificate is necessary in a suit by a son to recover money which was the self-acquired property of his deceased father (*g*) or in the execution by a widow of a money decree obtained by her husband (*h*). But no such certificate is necessary to recover money to which the plaintiff becomes entitled by survivorship (*i*).

Who may oppose grant of probate.—Where the nearest reversionary heir to a Hindu testator refuses without sufficient cause to oppose grant of probate, the next person in the line of succession may oppose it (*j*). In the last mentioned case the Court applied the principle stated in sec. 207 above.

Letters of administration where deceased was joint in estate.—No probate or letters of administration can be granted in respect of joint family property. But where such property stands in the name of the manager or other member of the family, letters of administration may be granted to the surviving coparcener as his heir to the legal estate in that property, and limited to that property, under sec. 250 of the Indian Succession Act, 1925 (*k*). This constantly happens in the case of shares of a limited company.

376. Vesting of estate in Hindu executor or administrator.—The executor or administrator of a deceased Hindu is his legal representative for all purposes, and all the property of the deceased vests in him as such (*l*).

See Indian Succession Act, 1925, sec. 211, corresponding with sec. 4 of the Probate and Administration Act, 1881.

No vesting of coparcenary property.—Coparcenary property cannot be disposed of by will. Hence it cannot vest in the executor (*m*).

Character of Hindu executor.—Before the passing of the Hindu Wills Act, 1870, the estate of a deceased Hindu *did not vest* in his executor, even if probate was granted to him. The executor was not the legal representative of the deceased person, but was practically a manager of the estate with no greater power than the manager of the estate of a minor, unless the will gave him greater powers. The grant of probate and letters of administration took effect only for the purpose of recovering debts and securing debtors

(*f*) *Chandra Kishore* v. *Prasanna Kumari* (1911) 38 I.A. 7, 38 Cal. 327, 9 I.C. 22, a case under s. 187 of the I. S. Act, 1865, as applied to Hindu wills by the Hindu Wills Act [now s. 213 of the I. S. Act, 1925, as applied by s. 57 of that Act].

(*g*) *Vairavan* v. *Srinivasachariar* (1921) 44 Mad. 499, 62 I.C. 944, ('21) A. M. 168 [F.B.]; *Venkataramanna* v. *Venkayya* (1891) 14 Mad. 377.

(*h*) *Jadowbai* v. *Puranmal* (1944) Nag. 832.

(*i*) *Raghavendra* v. *Bhima* (1892) 16 Bom. 349; *Jagmohandas* v. *Allu Maria* (1895) 19 Bom. 338; *Sital Proshad* v. *Kaiful Sheikh* (1922) 26 C.W.N. 488, 65 I.C. 367, ('22) A.C. 149.

(*j*) *Shib Charan Das, In the goods of* (1929) 56 Cal. 1070, 121 I.C. 687, ('30) A.C. 150.

(*k*) *Gopalaswamy* v. *Meenakshi* (1929) 7 Rang. 39, 115 I.C. 905, ('29) A.R. 99; *Bank of Bombay* v. *Ambalal Sarabhai* (1900) 24 Bom. 350; *Mussamat Uttam* v. *Dina Nath* (1918) 54 Punj. Rec. no. 139, 46 I.C. 454, ('18) A. L. 240.

(*l*) *Sir Mahomed Yusuf* v. *Hargovandas* (1923) 47 Bom. 231, 70 I.C. 268, ('22) A. B. 392; *Ramiah* v. *Venkatasubbamma* (1926) 49 Mad. 261, 94 I.C. 83, ('26) A.M. 434 [F.B.]; *Ganapathi* v. *Sivamalai* (1913) 36 Mad. 575, 17 I.C. 4.

(*m*) *Ujambai* v. *Harakchand Govindji* (1935) 59 Bom. 644, 37 Bom. L.R. 300, 156 I.C. 621, ('35) A.B. 242.

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paying the same, but neither an executor nor an administrator had any such rights as are conferred upon executors and administrators by the Indian Succession Act, 1925 (*n*).

Such was the state of the law prior to the Hindu Wills Act, 1870. That Act incorporated sec. 179 of the Indian Succession Act, 1865, which provided that "the executor or administrator, as the case may be, of a deceased person, is his legal representative for all purposes, and all the property of the deceased person vests in him as such." The Hindu Wills Act, 1870, however, did not apply to all Hindu wills. It applied only to (1) wills made within certain local limits, and (2) to wills relating to immoveable property situated within those limits [see sec. 369]. The Probate and Administration Act which applied to all Hindu wills, was not passed until 1881. The latter Act repealed the said sec. 179 as part of the Hindu Wills Act, but re-enacted it as part of itself in sec. 4. Both these Acts have been repealed and re-enacted by the Indian Succession Act, 1925. Sec. 211 of the latter Act corresponds to sec. 4 of the Probate and Administration Act.

Vesting of property in executor without probate.—The estate of the deceased vests in the executor whether he has obtained probate or not (*o*).

The contrary decision of the Calcutta High Court on the Probate and Administration Act, 1881, is now of no importance (*p*).

A and *B* are executors of *C*'s will. *A* alone obtains probate. This is no bar to *B*'s acting as a legal representative of *C*'s estate (*q*).

376A. Power of Hindu executor or administrator to dispose of property.—(*1*) A Hindu *executor* has power to dispose of the property of the deceased vested in him [sec. 376 above]. In the case, however, of immoveable property, this power is subject to any restriction contained in the will, unless he has obtained probate of the will and also leave from the Court which granted the probate to dispose of such property.

(*2*) A Hindu administrator has power to dispose of the property of the deceased vested in him [sec. 376 above]. In the case, however, of immoveable property, he cannot mortgage it or charge it or transfer it by sale, gift, exchange or otherwise, or grant a lease of it for a term exceeding five years, unless he has obtained the permission of the Court which granted the letters of administration to do so.

See Indian Succession Act, 1925, sec. 307, corresponding with sec. 90 of the Probate and Administration Act, 1881.

377. Intention of testator.—" In determining the construction [of a will] what we must look to, is the *intention* of the testator. The Hindu law, no less than the English law, points to the intention as the element by which we are to be guided in

(*n*) *Maniklal* v. *Mancherji* (1876) 1 Bom. 269, 275; *Jugmohandas* v. *Pallonjee* (1898) 22 Bom. 1; *Kherodemoney* v. *Doorgamoney* (1879) 4 Cal. 455, 468; *Sarat Chandra* v. *Bhupendra Nath* (1898) 25 Cal. 103; *Amulya* v. *Kalidas* (1905) 32 Cal. 861; *Mirza Kurrutulain* v. *Nuzbut-ud-Dowla* (1906) 33 Cal. 116, 129, 130, 32 I.A. 244, 257-258.

(*o*) *Mahomed Yusuf* v. *Hargovandas* (1923) 47 Bom. 231, 70 I.C. 268, ('22) A.B. 392; *Venkatasubbamma* v. *Ramayya* (1932) 55 Mad. 443, 59 I.A. 112, 136 I.C. 111, ('32) A.PC. 92.

(*p*) *Sakina Bibee* v. *Mahomed Ishak* (1910) 37 Cal. 839, 8 I.C. 655

(*q*) *Chidambara* v. *Krishnasami* (1916) 39 Mad. 365, 368-369, 28 I.C. 221, ('16) A.M. 720.

determining the effect of a testamentary disposition ; nor...... **S. 377**
is there any difference between the one law and the other as to the materials from which the intention is to be collected. Primarily *the words of the will* are to be considered. They convey the expression of the testator's wishes, but the meaning to be attached to them may be affected by *surrounding circumstances*, and where this is the case those circumstances no doubt must be regarded (*r*)."

"In all cases the primary duty of a court is to ascertain from the *language* of the testator what were his *intentions*, *i.e.*, to construe the will. It is true that in so doing they are entitled and bound to bear in mind other matters than merely the words used. They must consider the *surrounding circumstances*, *the position of the testator*, *his family relationships*, *the probability that he would use words in a particular sense*, and many other things which are often summed up in the somewhat picturesque figure. 'The Court is entitled to put itself into the testator's armchair.' Among such surrounding circumstances which the Court is bound to consider none would be more important than *race and religious opinions*, and the Court is bound to regard as presumably (and in many cases certainly) present to the mind of the testator influences and aims arising therefrom . . . This fundamental principle does not clash with the principle that the *Court will not necessarily apply English rules of construction* to such a will as we have here to deal with. . . Nor does this fundamental principle clash in any way with what is sometimes called, 'giving a liberal interpretation' to native wills. That native testators should be ignorant of the legal phrases proper to express their intentions, or of the legal steps necessary to carry them into effect, is one of the most important of the 'surrounding circumstances' which the Court must bear in mind, and it is justified in refusing to allow defects in expression in these matters to prevent the carrying out of the testator's true intentions. But *those intentions must be ascertained by the proper construction of the words he uses*, and once ascertained they must not be departed from (*s*)."

It is clear from the passage cited above that the intention of the testator is to be gathered primarily from the *language of*

(*r*) *Soorjeemoney Dossee* v. *Denobundoo Mullick* (1857) 6 M.I.A. 526, 551.

(*s*) *Narasimha* v. *Parthasarathy* (1914) 37 Mad. 199, 221-223, 41 I.A. 51, 70-72, 23 I.C. 166; *Sasanka Bhusan* v. *Gopi Ballav* ('35) A.C. 716, (1936) 63 Cal. 385, 159 I.C. 437.

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the will. Where the language is clear and consistent, it must receive its *literal* construction, unless there is something in the will itself to suggest departure from it (*t*). If the real meaning can be reasonably ascertained from the language used, that meaning is to be enforced to the extent and in the form which the law allows (*u*). Clear and unambiguous dispositive words are not to be controlled or qualified by any general expression of intention (*v*). Technical words or words of known legal import, must have their legal effect, even though the testator uses inconsistent words, unless those inconsistent words are of such a nature as to make it perfectly clear that the testator did not mean to use the technical terms in their proper sense. Thus the words "become *malik* (owner)" confer an heritable and alienable estate, unless the context indicates a different meaning. Similarly the words *putra putrade krame* have acquired a technical force, and are used as meaning an estate of inheritance (*w*). At the same time it must be recognized that documents in the vernacular are often expressed in loose and inaccurate language, and thus sometimes a meaning more extended or more retricted than the literal meaning may have to be given to particular words in vernacular documents provided the context justifies doing so (*x*). Particular words in a will should not be construed with reference to similar words in another will. The will must be read as a whole to ascertain the intention of the testator and where the intention is clearly expressed by unambiguous words in certain clauses other words in other clauses repugnant to them may be discarded (*y*).

Where a testator bequeathed his property to his wife absolutely with a condition that if unchastity is established the reversioners should share the property equally, it was held that unchastity does not cover re-marriage in the absence of a clause prohibiting re-marriage (*z*).

378. Ordinary notions and wishes of Hindus to be taken into consideration.—"In construing the will of a Hindu it is not

(*t*) *Gurusami* v. *Sivakami* (1895) 18 Mad. 347, 358, 22 I.A. 119.

(*u*) *Tagore* v. *Tagore* (1872) 9 Beng. L.R. 377, 395 I.A. Sup. Vol. 47, 65; *Rani Tarokessur Roy* v. *Soshi* (1883) 9 Cal. 952, 10 I. A. 51.

(*v*) *Basant Kumar Basu* v. *Ramshankar Ray* (1932) 59 Cal. 859, 138 I.C. 882, ('32) A.C. 600.

(*w*) *Lalit Mohun* v. *Chukkun Lal* (1897) 24 Cal. 834, 24 I.A. 76; *Surajmani* v. *Rabi Nath* (1908) 30 All. 84, 35 I.A. 17; *Pratapsing* v. *Agarsingji* (1919) 46 I.A. 97, 43 Bom. 778, 50 I.C. 457, ('18) A.PC. 192; *Soorjeemoney Dossee* v. *Denobundoo Mullick* (1857) 6 M.I.A. 526, 551; *Bissonauth* v. *Bamasoondery* (1867) 12 M.I.A. 41, 59. See also *Ram Narayan Singh* v. *Ram Saran Lal* (1919) 46 I.A. 88, 46 Cal. 683, 50 I.C. 1, ('18) A.PC. 203.

(*x*) *Rajendra Prasad* v. *Gopal Prasad* (1930) 57 I.A. 296, 10 Pat. 187, 127 I.C. 743, ('30) A.PC. 242.

(*y*) *Kanhya Lal Missir* v. *Mst. Hira Bibi* (1936) 15 Pat. 151, 163 I.C. 940, ('36) A.P. 323.

(*z*) *Har Bux Singh* v. *Musammat Shanti Devi* (1941) 16 Luck. 414, 192 I.C. 53, ('41) A.O. 353.

improper to take into consideration what are known to be the ordinary notions and wishes of Hindus with respect to the devolution of property. It may be assumed that a Hindu generally desires that an estate, especially an ancestral estate, shall be retained to his family, and it may be assumed that a Hindu knows that, as a general rule, at all events, women do not take absolute estates of inheritance which they are enabled to alienate" (*a*) [s. 143]. The predilections of the class to which the testator belongs may be kept in view (*b*). Where a testator gave certain properties to his daughters with a direction that they should enjoy the interest with their sons, grandsons, etc., and that neither the daughters nor their sons or grandsons, etc., should be entitled to give, sell or mortgage the properties, it was held that the daughters and the daughter's sons took only life estates (*c*). **S. 378**

(*a*) *Mahomed Shumsool* v. *Shewukram* (1874) 14 Beng. L.R. 226, 231, 232, 2 I.A. 7, 14-15; *Radha Prosad* v. *Ranee Mani* (1908) 35 Cal. 890, 902, 35 I.A. 118, 129.

(*b*) *Sasanka Bhusan* v. *Gopi Ballav* (1935) 159 I.C. 437, ('35) A.C. 716.

(*c*) *Bibabathi Debi* v. *Mahendra Chandra Lahiri* (1937) 1 Cal. 400, 173 I.C. 857, ('38) A.C. 34.

CHAPTER XX.

RULES COMMON TO GIFTS AND WILLS.

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379. Tagore case.—The leading case on Hindu wills and gifts is the *Tagore* case (*d*) decided by the Judicial Committee in the year 1872. A synopsis of that case is given in illustration (e) to sec. 382 below. The rules laid down in that case and the decisions founded thereon are set out in the following sections. The fundamental principle underlying those rules may be stated as follows :—

Subject to the provisions of sec. 368, a Hindu may give or bequeath his property to any one he likes. He may not only direct who shall take the estate, but may also direct what quantity of estate they shall take. But the person who is to take must be in existence at the date when the gift or bequest is to take effect, and the estate given to such person must be an estate recognized by the Hindu law. The validity of a gift or bequest depends on the fulfilment of the conditions not only as to the *person* who is to take, but also as to the *estate* which is to be taken by him. The mere fact that the donee is a person capable of taking under the deed or will is not sufficient to validate the gift. It is further necessary that the estate given to him must be one recognized by the Hindu law. As to what estates are not recognized by that law, see sec. 382 below. The rules laid down in the Tagore case as applicable to Hindu wills, are applicable to hereditary offices and endowments as well as to immoveable property (*e*).

In cases governed by the Hindu Transfers and Bequests Act, 1914, the Hindu Disposition of Property Act, 1916, and the Hindu Transfers and Bequests [City of Madras] Act, 1921, a grant may be made to an *unborn person* subject, however, to the limitations and provisions contained in those Acts [see secs. 383 to 387 below].

380. Estate of inheritance.—(*1*) An important rule applicable to wills and deeds of gift is that a benignant construction is to be used ; and that if the real meaning of the document can be reasonably ascertained from the language used, though that language be ungrammatical or untechnical, or mistaken as to name or description, or in any other manner incorrect,

(*d*) *Tagore* v. *Tagore* (1872) 9 Beng. L.R. 377, I.A. Sup. Vol. 47.

(*e*) *Ganesh Chander* v. *Lalbehari* (1936) 65 I.A. 448, 38 Bom. L.R. 1250, 164 I.C. 347, ('36) A.PC. 318.

provided it sufficiently indicates what was meant, that meaning shall be enforced to the extent and in the form which the law allows. Accordingly, if the gift confers an estate upon a man with words imperfectly describing the kind of inheritance but showing that it was intended that he should have an estate of inheritance, the language would be read as conferring an estate inheritable as the law directs. If, an estate were given to a man simply without express words of inheritance, it would, in the absence of a conflicting context, carry by Hindu law (as under the present state of law it does by will in England) an estate of inheritance. Thus a gift to *A* simply without the words "and his heirs" would, in the absence of conflicting context, pass by Hindu law an absolute estate. If there were added to such a gift an imperfect description of it as a gift of inheritance, not excluding the inheritance imposed by the law, an estate of inheritance would pass. If again, the gift were in terms of an estate inheritable according to law, with superadded words, restricting the power of transfer which the law annexes to that estate, the restriction would be rejected, as being repugnant, or, rather, as being an attempt to take away the power of transfer which the law attaches to the estate which the giver has sufficiently shown his intention to create, though he has added a qualification which the law does not recognise. **S. 380**

(2) If, on the other hand, the gift were to a man and his heirs, to be selected from a line other than that specified by law, expressly excluding the legal course of inheritance, as, for instance, if an estate were granted to a man and his eldest nephew, and the eldest nephew of such eldest nephew and so forth for ever, to take as his heirs, to the exclusion of all other heirs, and without any of the persons so taking having the power to dispose of the estate during his lifetime, then inasmuch as an inheritance so described is not legal, such a gift cannot take effect, except in favour of such persons as could take under a gift and to the extent to which the gift is inconsistent with the law. The first taker would, in this case, take for his lifetime, because the giver had at least that intention. He could not take more, because the language is inconsistent with his having any different inheritance from that which the gift attempts to confer, and that estate of inheritance which it confers is void (*f*).

(*f*) *Tagore* v. *Tagore* (1872) 9 Beng. L.R. 377, 395, I.A. Sup. Vol. 47, 66; *Manikyamala* v. *Nanda Kumar* (1906) 33 Cal. 1306.

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381. Limited estates.—A Hindu may create a life-estate or successive life-estates or any other estate for a limited term, provided the donee is a person capable of taking under the deed or will (*g*).

382. Estates repugnant or unknown to Hindu law.—A man cannot create a new form of estate, or alter the line of succession allowed by law, for the purpose of carrying out his own wishes or policy. Inheritance does not depend on the will of the individual owner. Inheritance is a rule laid down (or, in the case of custom, recognised) by the State, not merely for the benefit of individuals, but for reasons of public policy. It follows directly from this that a private individual, who attempts by gift or will to make property inheritable otherwise than the law directs, is assuming to legislate, and that the gift must fail, and the inheritance take place as the law directs (*h*). A will in favour of the testator's widow prohibiting all transfer of the property directing that all management of the property should be made after consultation of certain persons and giving her powers of nominating a legatee by her will, such legatee possessing certain qualifications is an attempt to create an estate unknown to Hindu law and is void (*i*).

A will or deed cannot institute a course of succession unknown to the Hindu law: and in conferring successive estates, the estate of inheritance must be such as is known to the Hindu law. All estates of inheritance created by gift or will, so far as they are inconsistent with the general law of inheritance, are void as such. An English estate tail is an estate unknown to the Hindu law; no person, therefore, can succeed under a gift or will as heir to such an estate (*j*). On this ground, wills and gifts which direct an estate to go in an order of succession which excludes female heirs (*k*) [that is, an estate in tail male], or male heirs (*l*), or heirs by adoption (*m*), or daughters and their sons (*n*), or includes only some of the heirs (*o*) have been held invalid to that extent.

(*g*) *Tagore* v. *Tagore* (1872) 9 Beng. L. R. 377, 405 I.A. Sup. Vol. 47, 75; *Rani Tarokessur Roy* v. *Soshi* (1883) 9 Cal. 952, 10 I A. 51.

(*h*) (1872) 9 Beng. L.R. 377, 394-395 I.A. Sup. Vol. 47, 65-66, *supra*.

(*i*) *Ramu* v. *Kashi* (1944) All. 9.

(*j*) (1872) 9 Beng. L.R. 377, 396 I.A. Sup. Vol. 47, *supra*; *Kristoromoni* v. *Narendro* (1889) 16 Cal. 383, 392, 16 I.A. 29.

(*k*) *Rani Tarokessur Roy* v. *Soshi* (1883) 9 Cal. 952, 10 I.A. 51; *Vullubhdas* v. *Gordhandas* (1890) 14 Bom. 360; *Venkata* v. *Chellayammi* (1894) 17 Mad. 150; *Lakshmakka* v. *Boggaramanna* (1896) 19 Mad. 501; *Lat Dhanlaxmi* v. *Hariprasad* (1921) 45 Bom. 1038, 62 I.C. 37, ('21) A.B. 262.

(*l*) *Kanhamina* v. *Kunhamli* (1909) 32 Mad. 315, 1 I.C. 195; *Chandra Choor Dev* v. *Vibhuti Bhushan Deva* (1944) 23 Pat. 763.

(*m*) *Suriya Rau* v. *Raja of Pittapur* (1886) 9 Mad. 499, 13 I.A. 97

(*n*) *Purna Sashi* v. *Kalidhan* (1911) 38 Cal. 603, 38 I.A. 112, 11 I.C. 412.

(*o*) *Manohar Mukherji* v. *Bhupendranath Mukherji* (1933) 60 Cal. 452, 141 I.C. 544, ('32) A.C. 791.

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Illustrations.

(a) Property is bequeathed to *B*, *and after him to the heirs male of his body*, that is, *his heirs in tail male.*

This case gives rise to the following three points :—

1st point.—The estate tail is void.—The bequest to *B*'s heirs is void, for the estate attempted to be conferred upon them is an estate in tail male, and such an estate is unknown to the Hindu law.

2nd point.—B takes an estate for life.—Does *B* take any interest under the will? If so, does he take an absolute estate or a life estate only? The answer is, that *B* takes a life estate only. He does not take an absolute estate, for the result of putting that construction on the will would be that *B*, as absolute owner, might mortgage or give away the property, in which case the property might pass away from the family to a mortgagee or a stranger donee. To adopt this construction would be in effect to make a new will for the testator and one which, so far from carrying his intention into effect, would be in direct opposition to his intention, and indeed to his main object, *viz.*, to keep the property in the family. But *B* certainly does take an estate for life, as in respect of him "the giver had at least that intention". The presumption is that the testator intended to benefit *B personally* for it is clear that if the bequest to *B* and his heirs in tail male were valid, it would have carried with it the enjoyment by *B* of the property during his life. "This intention, though it is mixed up with an intention to give an estate tail, may lawfully take effect."

3rd point.—Heir-at-law entitled to whole estate after B's death.—(a) The result is that *B* takes an estate for life, and on his death the property will revert to the testator's estate, that is, it will go to the testator's heirs (*p*). The rule of English common law that the undisposed of residue of personal estate vests in the *executor* beneficially, does not apply to the will of a Hindu testator in India (*q*).

(b) *A*, after providing for certain legacies, bequeaths the residue of his property to his executor upon trusts to pay the income *to his daughter B during her lifetime and after her death* upon trust to convey the property *to his brothers C and D in equal shares and to the heir or heirs male of their or either of their bodies* and on failure of these *to the sons of his daughter B.*

C had three sons living at *A*'s death. *D* had no son living at *A*'s death but two sons are born to him after *A*'s death, and during *B*'s lifetime. *B* had no son at *A*'s death, but six sons are born to her after *A*'s death. What are the rights of the parties under the will?

B takes an estate for life. *C* and *D* each takes an estate for his life in one moiety of the residue in remainder expectant on the death of *B*. The bequest to the heirs of *C* and *D* is void as it is a bequest of an estate tail. *B*'s sons are not entitled to any interest under the will, as none of them was in existence at the testator's death, and further, because the estate purporting under the will to be devised to them was already void before it could pass to them. The result is that on the deaths of *C* and *D* respectively, his moiety will pass to the testator's heir. If *C* dies in *B*'s lifetime, and if *B* is the heir-at-law, *C*'s moiety will pass to *B*, so that *B* will be entitled in possession to one moiety of the residue: *Kristoromoni* v. *Narendro* (1889) 16 Cal. 383, 16 I.A. 29.

In dealing with the contention that the brothers took an absolute estate, their Lordships observed as follows :—

"Their Lordships cannot see where the absolute gift of the property to the brothers comes in. It is given, not to them, but to them and their heirs male. Why should the words 'heirs male' be introduced at all, if an estate descendible to heirs general has

(*p*) *Tagore* v. *Tagore* (1872) 9 Beng. L. R. 377, 95 I.A. Sup. Vol. 47, 66; *Manikyamala* v. *Nanda Kumar* (1906) 33 Cal. 1306.

(*q*) *Lallubai* v. *Mankuvarbai* (1878) 2 Bom. 388.

S. 382 previously been given? The words must mean either that the estate of inheritance given to the brothers is a qualified one, or that the heirs male are to take somehow by way of direct gift from the testator. The latter of these two alternatives can only be reached by reading the word 'and' as if it was 'or'. Indeed one passage of the judgment looks as if this construction was in the mind of the learned judges. They point out that no words of limitation are attached to the words 'heirs, &c.' And they add, 'this shows that the intention was that whenever the estate was conveyed from his own trustees to his half-brothers who might be alive, *or* to their or either of their male descendants, it was to be an absolute estate as soon as it becomes vested in them.' This cannot refer merely to the circumstance that in making the conveyance after the daughter's death it might be necessary, if the brothers themselves were dead, to convey to their heirs, because, on the hypothesis of an absolute interest in the brothers, the conveyance would be to the heirs general or it might be to the alienees, not to the male descendants. The absence of words of limitation after the words 'heirs, &c.,' does not appear to their Lordships to be of much significance; but, as far as it goes, it rather favours the appellant's than the respondent's construction, because if 'heirs, &c.,' are themselves words of limitation, words of limitation attached to them would be inappropriate; otherwise they would be appropriate, and they would tend to show that the 'heirs' were objects of direct gift. But upon putting it to Mr. Rigby whether he claimed to read the word 'and' in a disjunctive sense he at once disclaimed any such contention, and indeed it is obvious that there are great difficulties in the way of such a construction, even if it would better the position of the respondents. Their Lordships therefore find that the first of the two alternative constructions is the only possible one."

(c) *A* bequeathes certain property to his three nephews, *B*, *C* and *D*, "for the payment of the expenses of their pious acts." He then directs as follows: "My three nephews shall possess the property in equal shares. They shall have no rights to alienate the same by gift or sale; but they, their sons, grandsons and their descendants in the *male* line shall enjoy the same. If any die without leaving a *male* child, his share shall devolve on the surviving nephews and their *male* descendants, but not on his other heirs.

A dies leaving him surviving the three nephews, *B*, *C* and *D*, and a son *F*. *B* dies unmarried. Then *C* dies leaving a widow, but no issue. *F* sues *D* for a declaration of his rights in the property. What are the rights of the parties at this stage in the property?

The bequest to the sons, grandsons and descendants of the nephews in the *male* line is void, for the effect of it is to exclude *females* altogether. Such an estate of inheritance is *inconsistent* with the general law of inheritance which admits males as well as females to succession. The attempt to confine the succession to males to the entire exclusion of females, is a distinct departure from Hindu law, 'excluding' in the terms of the judgment in the *Tagore* case, 'the legal course of inheritance'.

On *A*'s death *B*, *C* and *D* *each* took an *estate for life in one-third of the property.* On *B*'s death, his share went to his two brothers, *C* and *D*. On the death of *C*, *D* as the survivor of the three brothers, became entitled to a *life estate in the whole of the property* [s. 389].

In the case on which this illustration is based, it was contended that the intention of the testator was to confer an absolute estate on *B*, *C* and *D*, and that that intention might be effectuated by striking out that portion of the will which excluded females from succession. But this contention was overruled. The Judicial Committee said: "To alter the words prescribing the course of succession, so as to admit females, would be in effect to make a new will for the testator and one which, so far from carrying his intentions into effect, would be in direct opposition to his intention, and indeed to his main object expressed in other parts of his will, as well as in this clause, *viz.*, to exclude females." The result is that on *D*'s death, the whole property will revert to *A*'s estate

and pass to his heirs. If *F* is alive at *D*'s death, it will pass to him as the heir of *A* : *Rani Tarokessuar* v. *Soshi* (1883) 9 Cal. 952, 10 I.A. 51. **S. 382**

(d) Two brothers subject to the Dayabhaga school of Hindu law execute a joint will whereby they purport to provide for the permanent devolution of their respective properties in the *direct male line*, including adopted sons, with the conditions that on failure of lineal male heirs in one branch the properties belonging to that branch should go to the other, subject to the same rule; and that *only in the absence of male descendants in the direct line* in either branch should the properties go to *female heirs or their descendants.* The document is invalid and void. The object of the document is clearly to alter the rule of succession in the family to which the parties belonged by *excluding female heirs and their descendants.* Under it the female heirs and their descendants are not to receive the shares prescribed for them by the Hindu law of inheritance until there is an *indefinite* failure of male issue in both branches of the family. The result is that on the death of either of the two executants, his share will pass to his heirs according to the Dayabhaga law: *Purna Sashi* v. *Kalidhan* (1911) 38 Cal. 603, 38 I.A. 112, 11 I.C. 412.

Note.—The above case as well as the *Tagore* case [ill. (e)] must be distinguished from a case like the one in ill. (a) to sec. 389. The latter case does not point to an *indefinite* failure of male issue, but to a failure of male issue of any of the testator's sons *at the time* of the death of that son (*r*).

(e) *Tagore case.*—In the *Tagore* case property was bequeathed—

(1) to *A* for life;
to *A*'s eldest son for life;
in strict settlement upon the first and other sons of such eldest son successively in tail male. } = to *A* and his heirs *in tail male*,

(2) "after the failure or determination' of the above estate, to *B* and his heirs in tail male,

(3) "after the failure or determination" of the last mentioned estate, to the heirs of *C* in tail male.

The will expressly adopted primogeniture in the male line through males, and *excluded females and their descendants* (*s*).

At the time of the testator's death, *A*, the head of the first series of estates, had no son. *B*, the head of the second series of estates, had a son *D* born in the lifetime of the testator. *C* was dead at the making of the will but left a grandson *F* born in the lifetime of the testator. The testator died leaving an only son, *S*. No provision was made for him in the will, as he had become a Christian. Some time after the testator's death, his son *S* brought a suit to set aside the will. It was held that *A* took an estate for life that all other bequests were void, and that the plaintiff, as the heir of the testator, was entitled to the whole state after the death of *A*. The estates tail were void, for they were inconsistent with the Hindu law of inheritance. It was also held that *B* and *D*, though they were in existence at the testator's death, took nothing under the will, for they were only to take "after the failure or determination" of the previous series of estates, that is to say, *after the actual exhaustion of the line of A in conformity with the will.* This event had not arisen and could not arise. The *incapacity* of *A*'s line to succeed *by reason of the illegality of the will* did not entitle *B* or *D* to any benefit under the will. For the same reason, *F* though he was in existence at the testator's death, took nothing under the will: *Tagore* v. *Tagore* (1872) 9 Beng. L.R. 377, I.A. Sup. Vol. 47. The plaintiff's conversion to Christianity was no bar to his succession to his father's estate, having regard to the provisions of the Caste Disabilities Removal Act, 1850.

Note.—A Hindu may entirely disinherit his son or other heir by bequeathing the whole of his property to another. By so doing, he does not create an estate inconsistent with the general law of inheritance: he merely exercises the power which the Hindu law allows him. But what the Hindu law does not allow is to confer upon any

(*r*) *Soorjeemoney Dossey* v. *Denobundoo Mullick* (1862) 9 M.I.A. 123, 134.

(*s*) See also *The Administrator General of Bengal* v. *Lalbihari Dhar* (1934) 61 Cal. 39, 152 I.C. 710, ('34) A.C. 629.

S. 382 legatee an estate which would be *inconsistent with the Hindu law of inheritance*, in other words, an estate which would *exclude the legal course of inheritance*. An estate is said to be *inconsistent* with the Hindu law of inheritance if it is given to *A* and the heirs *male* of his body, for the effect is to exclude *female* heirs. If it were given to *A* absolutely, then, on *A*'s death intestate, the estate would pass according to the general law of inheritance to *A*'s heir, whether the heir was a son, or a *widow* or a daughter. But the attempt to give an estate to *A* and the heirs *male* of his body is to exclude *female* heirs; in other words it is an attempt to *alter the line of succession* allowed by law.

(f) A Hindu by a deed of settlement conveys property to trustees upon trust to pay the income arising therefrom to himself for life and after his death, as to a one-fourth share, to his married daughter *K* "for her sole and separate use and after her death in trust for the male heirs of the said *K* share and share alike." *K* survives the settlor and dies some years after the date of the settlement leaving 6 sons all of whom were in existence at the date of the deed. The gift to the sons is an absolute gift to them of the property and they take the property as tenants in common in equal shares. In the course of the judgment their Lordships of the Privy Council said: "In settling the true construction of this deed, therefore, unless there is a special reason afforded by the deed itself to the contrary, the technical meaning given to words in English law must be disregarded. So also must rules like the well-known rule in *Shelly*'s case, based here upon feudal customs that have had no existence in Bombay. Further, it is to be remembered that a gift to a class of which no member existed at the date of the deed would be bad, and so also a definite attempt to create what in England would be regarded as an estate tail: see *Tagore* v. *Tagore* (*t*). The main part of the respondents' argument depends upon this last consideration. They assert that this was the true meaning of the gift—to the male heirs of Krishnabai after Krishnabai's death—and that it consequently failed. They further argue that the words themselves connote a descendible quality of estate with which it was the intention of the settlor to impress the property either in the gift to Krishnabai or to the male heirs. Their Lordships are unable to accept this view, which is permeated by the suggestion that the words when used in a Bombay settlement are primarily words of inheritance denoting the character of an estate. They do not think that the male heirs of Krishnabai took by inheritance from her. They are of opinion that the estate that Krishnabai took was defined and limited by her life interest, and that it was not by descent from her but by virtue of a wholly independent gift that her male heirs were beneficiaries under the deed. These male heirs being in fact living at the date of the deed, no difficulty arises . . . . Their Lordships are of opinion that the true interpretation is that the persons who answer the description of male heirs at the date of Krishnabai's death were the persons in whose favour an independent gift was made, but that by operation of the Hindu law there would be excluded from that class people who were not living when the deed was executed. There is nothing whatever in the words of the grant to show that the estate so conferred was anything but an absolute estate upon such persons. For there is nothing to suggest, on the one hand, that such estate was limited to their life or, on the other, that any line of descent was marked out after their death. It is true that the gift is in the form of a gift of income but it is a gift unlimited in point of time, and if there be no restriction in the gift and no limitations beyond the actual beneficiaries at Krishnabai's death such a gift carries the whole estate": *Madhavrao* v. *Balabhai* (1928) 55 I.A. 74, 52 Bom. 176, 107 I.C. 119, ('28) A.PC. 33. The rule in this section applies to wills providing for succession of shebaits of an endowment (*u*).

When the husband gave his wife full powers of transfer over the property but without giving her an absolute estate such a disposition is not repugnant to Hindu Law and alienations by her are binding on the reversioner (*v*).

(*t*) (1872) 9 Beng. L.R. 377, I.A. Sup. Vol. 47.
(*u*) *Ganesh Chander* v. *Lalbehari* (1936) 65 I.A. 448, 38 Bom. L.R. 1250, 164 I.C. 347, ('36) A.PC. 318.
(*v*) *Bishun Singh* v. *Shri Thakurji Bangla Nain Bhagwan* 72 I.A. 27.

383. Limitations subject to which a gift or bequest can be made to an unborn person.—As has already been stated, a Hindu may under the Acts of 1914, 1916 and 1921 referred to in secs. 360 and 373 above, dispose of his property by *transfer inter vivos* or by will in favour of an unborn person. This, however, can only be done subject to certain limitations and provisions. These limitations and provisions are— **Ss. 383, 384**

(a) in respect of dispositions by transfers *inter vivos*, those contained in Chapter II of the Transfer of Property Act, 1882, and

(b) in respect of dispositions by will, those contained in sections 113, 114, 115 and 116 of the Indian Succession Act, 1925.

Chapter II of the Transfer of Property Act, 1882, did not originally apply to Hindus. It has now been extended to Hindus by the Transfer of Property (Amendment) Act 20 of 1929, sec. 3. The sections of that Chapter material for the present purposes are secs. 13, 14, 15 and 16, which correspond to secs. 113, 114, 115 and 116 of the Indian Succession Act, 1925. Both those sets of sections are similar in substance; they are therefore dealt with together in secs. 384, 385, 386 and 387 below.

All the eight sections *assume* that a gift or bequest can be made in favour of an unborn person. They did not apply to Hindus at first. They were gradually made applicable to Hindus. The Hindu Transfers and Bequests Act, 1914, and the Hindu Transfers and Bequests [City of Madras] Act, 1921, incorporated only s. 14 of the Transfer of Property Act and the corresponding s. 114 of the Indian Succession Act, being the sections which relate to the rule against perpetuity. The Hindu Disposition of Property Act, 1916, incorporated two more sections, namely, s. 13 of the Transfer of Property Act and the corresponding s. 113 of the Indian Succession Act. The first time all the eight sections were applied to Hindu gifts and wills was by the Transfer of Property (Amendment) Supplementary Act 21 of 1929, by which all the three Acts mentioned above were amended and they were all made uniform: see ss. 11, 12 and 13 of Act 21 of 1929.

384. Disposition in favour of unborn person subject to prior disposition.—Where a gift is made to a person not in existence at the date of the gift or a bequest is made to a person not in existence at the death of the testator, subject to a prior gift or bequest, the later gift or bequest shall not take effect, unless it extends to the whole of the remaining interest of the donor or testator in the property.

Illustrations.

(1) *Gift.*—*A* transfers property of which he is the owner to *B* in trust for *A* and his intended wife successively for their lives, and, after the death of the survivor, for the eldest son of the intended marriage *for life*, and after his death for *A*'s second son. The interest so created for the benefit of the eldest son does not take effect, because it does not extend to the whole of *A*'s remaining interest in the property.

Ss. 384, 385

(2) *Bequest.*—Property is bequeathed by a father to his son for life, after his death, to his son's wife for life and after her death to certain other persons. The son's wife was not in existence at the date of the testator's death. The bequest to her, not being of the whole interest, is void (*w*).

This section is a combination of s. 13 of the Transfer of Property Act, 1882, and s. 113 of the Indian Succession Act, 1925.

385. **Rule against perpetuity.**—(*1*) *Gift.*—No transfer of property can operate to create an interest which is to take effect after the lifetime of one or more persons living at the date of such transfer, and the minority of some person who shall be in existence at the expiration of that period, and to whom, if he attains full age, the interest created is to belong.

(*2*) *Bequest.*—No bequest is valid whereby the vesting of the thing bequeathed may be delayed beyond the lifetime of one or more persons living at the testator's death, and the minority of some person who shall be in existence at the expiration of that period, and to whom, if he attains full age, the thing bequeathed is to belong. The rule applies to private trusts also (*x*).

Illustrations.

(a) A fund is bequeathed to *A* for his life, and after his death to *B* for his life, and after *B*'s death to such of the sons of *B* who shall first attain the age of 25. *A* and *B* survive the testator. Here the son of *B* who shall first attain the age of 25 may be a son born after the death of the testator; such son may not attain 25 until more than 18 years have elapsed from the death of the survivor of *A* and *B*; and the vesting of the fund may thus be delayed beyond the lifetime of *A* and *B* and the minority of the sons of *B*. The bequest after *B*'s death is void.

(b) A fund is bequeathed to *A* for his life, and after his death to *B* for his life, and after *B*'s death to such of *B*'s sons as shall first attain the age of 25. *B* dies in the lifetime of the testator, leaving one or more sons. In this case the sons of *B* are persons living at the time of the testator's decease, and the time when either of them will attain 25 necessarily falls within his own lifetime. The bequest is valid.

(c) A fund is bequeathed to *A* for his life, and after his death to *B* for his life, with a direction that after *B*'s death it shall be divided amongst such of *B*'s children as shall attain the age of 18, but that, if no child of *B* shall attain that age, the fund shall go to *C*. Here the time for the division of the fund must arrive at the latest at the expiration of 18 years from the death of *B*, a person living at the testator's decease. All the bequests are valid.

Sub-sec. (*1*) is sec. 14 of the Transfer of Property Act, 1882. Sub-sec. (*2*) is sec. 114 of the Indian Succession Act, 1925. Both these sections are the same in substance, though different in form.

The rule against perpetuity does not apply to charitable or religious endowments. See sec. 411 below.

(*w*) *Kuppusami Pillai* v. *Jayalakshmi Ammal* (1935) 58 Mad. 15, 154 I.C. 537, ('34) A.M. 705; *Bibabathi Debee* v. *Mahendra Chandra Lahiri* (1937) 1 Cal. 400, 173 I.C. 857, ('38) A.C. 34.

(*x*) *Ajitkumara Mitra* v. *Tarubala Dasi* (1936) 63 Cal. 209.

Rule of Hindu law before legislation.—The above rules apply only to gifts and bequests which are within the Hindu Transfers and Bequests Act, 1914, the Hindu Disposition of Property Act, 1916, and the Hindu Transfers and Bequests [City of Madras] Act, 1921, dealt with in sec. 360 above. As to gifts and bequests which do not come within those Acts, the old rule still applies. That rule may be stated as follows :—

Where it appears from the will that the intention of the testator was not to pass the estate at all, but to create a perpetuity, as where the will contains a direction, as regards the *corpus*, that it should be kept intact for ever, and, as regards the income of the property, that portion thereof should be enjoyed by the testator's sons, grandsons and their descendants for ever and that the rest should be accumulated, the direction is invalid, and the estate will pass as an estate intestate. The Hindu law does not allow property to be tied up in perpetuity except in the case of religious and charitable endowments (*y*). The same principle applies to transfers *inter vivos* (gifts). This rule may be explained by the following illustration :—

Illustration.

A will contains as to the property purported to be bequeathed thereby the following directions :—

(1) that the property shall not be alienated at all;

(2) that six-sixteenths of the net income of the property shall be applied towards the maintenance of the members of the testator's family and the families of his sons, grandsons and their descendants *in perpetuity ;*

(3) that the remaining ten-sixteenths should be accumulated and carried to the credit of the estate.

The will is invalid, and the property will descend to the testator's heirs as on intestacy. The above directions show that it was not the intention of the testator to pass the estate at all. It is not a case where the testator has expressed an *intention to pass the estate*, and has *added* a clause against alienation, in which case the clause against alienation would be void [s. 393], and the gift of the estate would take effect. In the case put above, the will *starts with* a provision against alienation, and this provision is confirmatory of the other parts of the will which clearly show an *intention to create a perpetuity* (*z*).

386. Gift or bequest to a class.—If a gift or bequest is made to a class of persons with regard to some of whom it fails by reason of the rules contained in secs. 384 and 385 above, such gift or bequest fails in regard to those persons only and not in regard to the whole class.

Illustrations.

(a) A fund is bequeathed to *A* for life, and after his death to all his children who shall attain the age of 25. [The gift to *A*'s children is a gift to a class]. *A* survives the testator, and has some children living at the testator's death. Each child of *A*'s living at the testator's death must attain the age of 25 (if at all) within the limits allowed for a bequest [sec. 385 (*2*)]. But *A* may have children after the testator's decease, some of whom may not attain the age of 25 until more than 18 years have elapsed after the decease of *A*. The bequest to *A*'s children, therefore, is inoperative as to any child born after the testator's death and in regard to those who do not attain the age of 25 within 18 years after *A*'s death, but is operative in regard to the other children of *A*.

(*y*) *Shookmoy Chandra* v. *Monoharri Dassi* (1885) 11 Cal. 684, 12 I.A. 103; *Raikishori* v. *Debendranath* (1888) 15 Cal. 409, 15 I.A. 37; *Vullabhdas* v. *Gordhandas* (1890) 14 Bom. 360; *Kumara Asima* v. *Kumara Krishna* (1869) 2 Beng. L.R. O.C. 11.

(*z*) *Ibid.*

S. 386 (b) A fund is bequeathed to *A* for his life, and after his death to *B, C, D* and all other children of *A* who shall attain the age of 25. *B, C, D* are children of *A* living at the testator's decease. In all other respects the case is the same as that supposed in ill. (a). Although the mention of *B, C* and *D* by name does not prevent the bequest from being regarded as a bequest to a class, the bequest is not wholly void. It is operative as regards any of the children *B, C* or *D*, who attains the age of 25 within 18 years after *A*'s death.

This is a combination of sec. 15 of the Transfer of Property Act, 1882, as amended by the Transfer of Property (Amendment) Act 20 of 1929, sec. 9 and sec. 115 of the Indian Succession Act, 1925, as amended by the Transfer of Property (Amendment) Supplementary Act 21 of 1929, sec. 14. Before the amendment, if a gift or bequest to a class failed as to any member thereof, the gift or bequest was *wholly* void. Since the amendment, it is not wholly void. It is void only as to those in regard to whom it fails. The above illustrations are illustrations (i) and (ii) to sec. 115 of the Indian Succession Act as amended by the Supplementary Act.

Sec. 15 of the Transfer of Property Act and sec. 115 of the Indian Succession Act, before they were amended as aforesaid, were enacted on the principle of the decision in *Leake* v. *Robinson* (a). That principle is thus stated in Theobold on Wills: "Where there is a gift to a class, any members of which may have to be ascertained beyond the limits of perpetuity—for instance, to the children of a living person who shall attain twenty-five—the whole gift is void."

Rule of Hindu law as to gift to a class and subsequent legislation.—Before the Acts of 1914, 1916, and 1921, relating to gifts and bequests to unborn persons [secs. 360, 373], a gift to a person who was not in existence at the date of the gift was void; and so was a bequest to a person who was not in existence at the date of the testator's death. This proceeded on the principle that a person who was not in existence at the material date was *incapacitated* from taking. Thus if a gift was made by a Hindu to his grandsons, and none of them was in existence at the date of the gift, none of them had the *capacity* to take, and the gift was therefore void. But what if a gift was made by a Hindu to his grandson *S* who was in existence at the date of the gift, and to other grandsons (brothers of *S*) who might be born *after the date of the gift*, and some grandsons are born after the date of the gift? It is obvious that the grandsons who were born after the date of the gift could not take, but could *S* take? In some of the earlier cases it was held on the analogy of the rule in *Leake* v. *Robinson*, that the gift having failed as to the other grandsons, it was wholly void, and that *S* too could not take. But it was held in later cases and also by the Judicial Committee that the rule in *Leake* v. *Robinson* was a rule of construction of the English law, and that it did not apply to Hindus, and that the *incapacity* of the other grandsons to take did not incapacitate *S* from taking, with the result that *S* took the whole of the property which was the subject-matter of the gift (b). Further, the rule in *Leake* v. *Robinson* is confined in terms to cases where the members of the class may have to be ascertained *beyond the limits of perpetuity.* But the sections of the Transfer of Property Act and the Indian Succession Act which contain the rule against perpetuity did not then apply to Hindus, and *Leake* v. *Robinson* therefore could not possibly apply to Hindu gifts and bequests.

(a) (1817) 2 Mer. 363.

(b) *Rai Bishenchand* v. *Mussumat Asmaida Koer* (1884) 6 All. 560, 11 I.A. 164; *Ram Lal Sett* v. *Kanai Lal Sett* (1886) 12 Cal. 663; *Bhagabati* v. *Kalicharan* (1911) 38 Cal. 468, 38 I.A. 54, 10 I.C. 641 [affirming s.c. in 32 Cal. 992]; *Rani Moni* v. *Radhaprasad* (1914) 41 Cal. 1007, 41 I.A. 176, 23 I.C. 713, ('14) A.PC. 140; *Manjamma* v. *Padmanabhayya* (1889) 12 Mad. 393; *Ranganadha* v. *Bhagirathi* (1906) 29 Mad. 412; *Mangaldas* v. *Tribhuvan Das* (1891) 15 Bom. 652; *Tribhuvan Das* v. *Gangadas* (1894) 18 Bom. 7; *Krishna Rao* v. *Benabai* (1896) 20 Bom. 571; *Khimji* v. *Morarji* (1898) 22 Bom. 533; *Advocate-General* v. *Karmali* (1905) 29 Bom. 133, 155-156.

We shall now observe the course of legislation. First came the Madras Act of 1914. It validated gifts and bequests in favour of unborn persons, and *thus removed the bar of incapacity*. It also applied for the first time the rule against perpetuity to cases governed by that Act. Similar provisions were introduced by the Hindu Disposition of Property Act, 1916, and the Hindu Transfers and Bequests [City of Madras] Act, 1921 : see secs. 360 and 373 above. The result of all that was that in the case put above grandsons other than *S*, though not in existence at the date of the gift, could also take under the deed.

The Indian Succession Act in force when the three Acts were passed was that of 1865. Sec. 101 related to the rule against perpetuity; it is now sec. 114 of the Indian Succession Act, 1925. Sec. 102 related to bequests to a class; this corresponds to sec. 115 of the Indian Succession Act, 1925, before it was amended in 1929. Another Act in force when the three Acts were passed was the Hindu Wills Act, 1870. Certain sections of the Indian Succession Act, 1865, were made applicable to cases governed by the Hindu Wills Act, one of them being sec. 102. Sec. 102 was in the following terms :—

" If a bequest is made to a class of persons with regard to some of whom it is inoperative by reason of the provisions of section 100 or section 101, such bequest is *wholly void*."

Though sec. 101 was incorporated in all the three Acts, sec. 102 was not, the intention being to keep alive the rule of Hindu law that if a gift or bequest was made to a class of persons with regard to some of whom it was inoperative by reason of the fact that they were not in existence at the material date, the gift or bequest failed in regard to those persons only and not in regard to the whole class. But the legislature seemed to have overlooked the Hindu Wills Act, and particularly the inclusion in that Act of sec 102. This was not noticed until the decision of the Judicial Committee in *Soundara Rajan* v. *Natarajan* (c). The will in that case was governed by the Madras Act of 1914. Amongst the properties disposed of by the will were some immoveable properties situated in the city of Madras. This attracted the applicability of the Hindu Wills Act. The testator died in 1904, leaving three daughters, *A*, *B* and *C*. *A* had four children, *three born before* and one after 1904. *B* had one child *born before* 1904. *C* had six children all born after 1904. By this will the deceased directed his trustees to apportion his residuary trust fund into as many equal shares as there were daughters, to pay the income from each of such shares to the daughters for life respectively, and after the death of each daughter to hold the share appropriated to her " upon trust for the children of such daughter who shall attain the *age of twenty-one years*." The testator was survived by the three daughters. After their death a suit was brought by the children of the third daughter *C* against the children of *A* and *B* for construction of the will and for administration of the estate of the testator. The Judicial Committee held that the bequest to the unborn children was invalid under sec. 101 of the Indian Succession Act, 1865 [now the Indian Succession Act, 1925, sec. 114], as it offended the rule against perpetuity, and that the bequest being to a *class*, and being invalid as to some members, it failed also in regard to the children born before the death of the testator under sec. 102 of that Act (corresponding to the Indian Succession Act, 1925, sec. 115, before it was amended in 1929). In the case under consideration the bequest to the children born after the testator's death failed not because of the rule of Hindu law that a bequest to an unborn person in void, for the Madras Act validated such bequest, but because of the rule against perpetuity contained in sec. 101. The bequest being void as to some members of the class under sec. 101 it was *wholly* void under sec. 102. This led to the amendment of sec. 15 of the Transfer of Property Act, 1882, and sec. 115 of the Indian Succession Act, 1925, in the manner stated above.

387. Failure of prior disposition.—Where a gift or bequest fails by reason of any of the rules contained in sections 384

(c) (1925) 52 I.A. 310, 48 Mad. 906, 92 I.C. 289, ('25) A.P.C. 244.

and 385 above, any gift or bequest intended to take effect after or upon failure of such prior gift or bequest also fails.

Illustration.

A fund is bequeathed to *A* for his life, and after his death to such of his sons as shall first attain the age of 25 for his life, and after the decease of such son to *B*. *A* and *B* survive the testator. The bequest to *B* is intended to take effect after the bequest to such of the sons of *A* as shall first attain the age of 25, which bequest is void under sec. 114 of the Indian Succession Act, 1925 [sec. 385 (*2*) above]. The bequest to *B* is also void (*d*).

This is a combination of sec. 16 of the Transfer of Property Act, 1882, and sec. 116 of the Indian Succession Act, 1925.

388. Independent and alternative bequests.—Where there are independent and alternative gifts or bequests, of which one is good at the time the document takes effect, and the other is void, the former will take effect, and the latter will be disregarded (*e*). Where a testator made some bequests of property in favour of his relations and other bequests for charitable purposes and some of the former bequests were invalid, the latter were held to be valid as they were separable from and not dependant on the former (*f*).

389. Grant subject to defeasance: Executory bequest.—It is competent to a Hindu to make a grant of an absolute estate *defeasible* on the happening of a subsequent event. But the event must happen, if at all, immediately on the close of a life in being, *and* the gift over must be in favour of some person in existence at the date of the gift or at the death of the testator, as the case may be; otherwise, the gift over is void, and the absolute estate granted to the first donee remains unaffected (*g*).

In cases, however, governed by the Hindu Transfers and Bequests Act, 1914, the Hindu Disposition of Property Act, 1916, and the Hindu Transfers and Bequests [City of Madras]

(*d*) *Tagore* v. *Tagore* (1872) 9 Beng. L.R. 377, 410, I.A. Sup. Vol. 47, 80; *Soudaminey Dossee* v. *Jogesh Chunder* (1877) 2 Cal. 262; *Javerbai* v. *Kablibai* (1892) 16 Bom. 492, in app. from 15 Bom. 326.

(*e*) *Raikishori* v. *Debendranath* (1887) 15 Cal. 409, 15 I.A. 37.

(*f*) *Kayastha Pathsala Allahabad* v. *Mt. Bhagwati Devi* (1937) 64 I.A. 5, (1937) All. 3, 39 Bom. L.R. 322, 166 I.C. 4, ('37) A.PC. 4.

(*g*) *Soorjeemoney Dossey* v. *Denobundoo Mullick* (1862) 9 M.I.A. 123, s.c. 6 M.I.A. 526; *Kristoromoni* v. *Narendro* (1888) 16 Cal. 383, 392, 16 I.A. 29; *Bissonauth* v. *Bamasoonderry* (1867) 12 M.I.A. 41, 48 [devise held absolute]; *Bhoobun Mohini* v. *Hurrish Chunder* (1878) 4 Cal. 23, 5 I.A. 138 [held, gift operated as an absolute grant, as the event specified did not occur]; *Rani Tarokessar Roy* v. *Soshi* (1883) 9 Cal. 952, 10 I.A. 51 [case of gift over of a life estate]; *Lalit Mohun* v. *Chukkun Lal* (1897) 24 Cal. 834, 850, 24 I.A. 76; *Purna Sashi* v. *Kalidhan* (1911) 38 Cal. 603, 619, 620, 38 I.A. 112, 120, 11 I.C. 412; *Lakshminarayana* v. *Valliammal* (1911) 34 Mad. 250, 11 I.C. 767; *Saraju Bala* v. *Jyotir Moyee* (1931) 58 I.A. 270, 59 Cal. 142, 134 I.C. 648, ('31) A.PC. 179; *Narsingh Rao* v. *Mahalakshmi Bai* (1928) 55 I.A. 180, 50 All. 375, 109 I.C. 703, ('28) A.PC. 156. See also Transfer of Property Act, 1882, ss. 28, 30; *Mt. Rameshwar Kuer* v. *Sheo Lal Upadhya* (1935) 14 Pat. 640, 156 I.C. 33, ('35) A.P. 401.

Act, 1921, the gift over may be made in favour even of a person not in existence at the death of the testator. **S. 389**

Illustrations.

(a) A Hindu bequeaths his property to his five sons in equal shares, and directs that *in the event of* any of his sons dying without sons or sons' sons, his share shall pass over to the sons then living or their sons. All the five sons survive the testator. One of the sons, *A*, dies leaving a widow, but *without leaving sons or sons' sons.* The gift over to the surviving sons is valid, and they are entitled to the one-fifth share of the deceased sons to the exclusion of his widow. The effect of the will is to give an absolute estate to each son if he dies leaving sons or sons' sons subject to defeasance in the event of his death without leaving sons or sons' sons. If *A* had died *leaving sons or sons' sons,* he would have taken an absolute estate which he could have disposed of by will (*h*), and which on intestacy would have passed to his heirs: *Soorjeemoney Dossey* v. *Denobundoo Mullick* (1862) 9 M.I.A. 123 s.c. 6 M.I.A. 526; *Chunilal* v. *Bai Samarth* (1914) 38 Bom. 399, 23 I.C. 645, ('14) A.PC. 60; *Navalchand* v. *Maneckchand* (1921) 23 Bom. L.R. 450, 62 I.C. 98, ('21) A.B. 25. [It may be observed that any son of the testator may alienate his share even before the event happens, but the alienee will in that case take the share *subject to the defeasance clause:* (1921) 23 Bom. L.R. 450, 62 I.C. 98, ('21) A.B. 25.]

Note.—The case put above was *not* governed by the Hindu Wills Act, 1870. Had it been governed by that Act, the will would have to be construed with reference to sec. 111 of the Indian Succession Act, 1865, (now sec. 124 of the Act of 1925) it being one of the sections made applicable by the Hindu Wills Act to wills governed by that Act Sec. 111 provides that "where a legacy is given if a *specified uncertain event* shall happen and *no time is mentioned in the will for the occurrence of that event,* the legacy cannot take effect, unless such event happens *before* the period when the fund bequeathed is payable or distributable." Ill. (a) to sec. 111 is as follows: "A legacy is bequeathed to *A*, and, in case of his death, to *B*. If *A* survives the testator, the legacy to *B* does not take effect."

In the case put in our illustration, the *uncertain event* on the happening of which the one-fifth share of a son is to go to his brothers is the *death* of the son without leaving sons or sons' sons. Under sec. 111 the rule has been taken from an English case which has been overruled by later English cases. The section, it has been held, should be applied strictly to cases coming within its scope (*i*).

Sec. 124 of the Indian Succession Act, 1925, (sec. 111 of the Act of 1865), is one of the sections mentioned in Schedule III to that Act. Those sections applied in the first instance to wills of the classes specified in cls. (a) and (b) of sec. 57 of that Act, being wills to which the Hindu Wills Act, 1870, applied. Since the Indian Succession (Amendment) Act, 1929, those sections apply also to *other wills* executed on or after the 1st January, 1927. The Act of 1929 came into force on the 1st October, 1929.

A Hindu testator bequeathed a moiety of his estate to his son and provided that the other moiety was to be held by the son and other persons in trust for the son's male issue and further provided that in case of the son's death without male issue it should go to a certain named charitable Institute. The son died without male issue. It was held by the Judicial Committee that the gift to the trust took effect on the death of the son and that the gift to charity, which was subject to the above condition, was valid (*j*).

(b) *A* executes a deed of settlement whereby he gives certain property to his daughter *B* absolutely with the condition superadded that the property should revert to *A*'s heirs

(*h*) *Bhoobun Mohini* v. *Hurrish Chunder* (1879) 4 Cal. 23, 5 I.A. 138.

(*i*) *Bhupendra* v. *Amarendra* (1916) 43 I.A. 12. 43 Cal. 432, 34 I.C. 892, ('15) A.PC. 101.

(*j*) *Gada Dhur Mallik* v. *Official Trustee of Bengal* (1940) 1 Cal. 415, 187 I.C. 108, 67 I.A. 129, ('40) A.PC. 45.

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on failure of the male descendants of *A*. Here the event on the happening of which the defeasance clause is to operate, namely, the indefinite failure of male issue, may not take place at *B*'s death. The gift over to *A*'s heirs is therefore void, and the absolute estate granted to *B* remains unaffected: *Saraju Bala* v. *Joytir Moyee* (1931) 58 I.A. 270, 59 Cal. 142, 134 I.C. 648, ('31) A.PC. 179.

(c) By a deed of settlement executed *in* 1875 the settlor created an absolute estate in favour of his wife with a condition that if a son was born to the settlor's son (whom he had disinherited), the property should go to him. *Held* that the gift over to the grandson being a gift in favour of an unborn person was void, with the result that the absolute estate granted to the wife remained unaffected. Had the case been governed by any of the three Acts mentioned in the second paragraph of this section, the gift over would have been valid (*k*).

As to Settled Estates in Bengal, see the Bengal Settled Estates Act, 1904.

390. Gift or bequest by way of remainder.—A grant by way of remainder is valid provided—

(1) the grant is to take effect immediately on the close of a life in being, *and*

(2) it is made to a person in existence at the date of the gift or at the death of the testator as the case may be (*l*).

In cases, however, governed by the Hindu Transfers and Bequests Act, 1914, the Hindu Disposition of Property Act, 1916, and the Hindu Transfers and Bequests (City of Madras) Act, 1921, a gift by way of remainder may be made in favour of an unborn person.

Illustration.

Property is bequeathed to *A* for life, and after his death to *B*. Both *A* and *B* are in existence at the death of the testator. *A* takes an estate for life. *B* takes the remainder after *A*'s death. The bequest to *B* by way of remainder is valid: *Ranganadha* v. *Bhagirathi* (1906) 29 Mad. 412.

391. Trust valid for valid purposes.—Trusts are not unknown to Hindu law, but they can only be sustained to the extent and for the purpose of giving effect to those beneficiary interests which are recognized by that law. A disposition of property which is inherently illegal, as where the donee is not a person legally capable of taking, or the estate which he is given is not recognized by Hindu law, cannot be made to take effect by the medium of a trust. That which cannot be done directly by gift cannot be done indirectly by

(*k*) *Norendra Nath* v. *Kamalbasini Dasi* (1896) 23 Cal. 563, 23 I.A. 18; *Lala Ramjewan* v. *Dal Koer* (1897) 24 Cal. 406.

(*l*) *Ranganadha* v. *Bhagirathi* (1906) 29 Mad. 412; *Soojeemoney Dossey* v. *Deenobundoo Mullick* (1862) 9 M.I.A. 123, s.c. 6 M.I.A. 526; *Motivahu* v. *Mamubai* (1897) 21 Bom. 709, 721, 24 I.A. 93; *Ram Bahadur* v. *Jager Nath* (1918) 3 Pat. L.J. 199, 45 I.C. 749, ('18) A.P. 469 [F.B.].

the intervention of a trustee (*m*). See as to gifts, ss. 357, 359 and 360, and as to wills ss. 368, 372 and 373.

392. Condition repugnant to interest created.—Where by the terms of a deed or will an absolute estate of inheritance is created in favour of a person, any subsequent clause purporting to restrict that interest is invalid, and the donee will take an absolute estate as if the document contained no such clause (*n*).

393. Condition restraining alienation or partition.—Where property is given absolutely to a person, but the transfer or will contains a direction that it shall not be alienated (*o*), or partitioned (*p*), or that it shall be applied or enjoyed in a particular manner (*q*), such direction is inoperative, and the donee will take the property as if the document had contained no such direction [s. 362].

394. Direction postponing payment to donee or legatee.—Where a transfer or will confers an absolute estate, but directs that the property shall not be made over to the donee or legatee until he has attained a certain age beyond the period of his majority, such direction is inoperative, and he is entitled to the property on attaining majority as if the document contained no such direction. But the direction will be valid and it will take effect if during the interval the income of the property is disposed of in favour of some other person (*r*).

Thus if property is bequeathed to *A*, a minor, with a direction that it shall not be handed over to him until he attains the age of 20 years, the direction is inoperative, and *A* is entitled to receive the property on his attaining majority. But if the will contains a direction that until *A* attains the age of 20 years, the income of the property shall be given to *B*, then *A* is not entitled to receive the property until he attains the age of 20 years.

(*m*) *Tagore* v. *Tagore* (1872) 9 Beng. L. R. 377, 401-402, I.A. Sup. Vol. 47, 71, 72; *Rajendar* v. *Sham Chund* (1881) 6 Cal. 106; *Kahandas Narrandas, in re* (1881) 5 Bom. 154, 173-174.

(*n*) *Bhaidas* v. *Bai Gulab* (1922) 49 I.A. 1, 46 Bom. 153, 65 I.C. 974, ('22) A.PC. 193; *Raghunath Prasad* v. *Deputy Commissioner* (1929) 56 I. A. 372, 4 Luck. 483, 120 I.C. 641, ('29) A.PC. 283; *Saraiu Bala* v. *Jyotir Moyee* (1931) 58 I.A. 270, 59 Cal. 142, 134 I.C. 648, ('31) A.PC. 179; *Partap Chand* v. *Mt. Mokhani* (1933) 14 Lah. 485, 144 I.C. 651, ('33) A.L. 365; *Kandarp Mohan Goswami* v. *Akshaychandra Basu* (1934) 61 Cal. 106, 150 I.C. 179, ('34) A.C. 379.

(*o*) *Tagore* v. *Tagore* (1872) 9 Beng. L. R. 377, 395, I.A. Sup. Vol. 47, 65; *Ashutosh* v. *Durga* (1880) 5 Cal. 438, 6 I.A. 182; *Gokul Nath* v. *Issur Lochun* (1887) 14 Cal. 222; *Raikishori* v. *Debendranath* (1888) 15 Cal 409, 15 I.A. 37; *Chandi Churn* v. *Sidheswari* (1889) 16 Cal. 71, 15 I.A. 149; *Lalit Mohun* v. *Chukkun Lal* (1897) 24 Cal 834, 24 I. A. 76; *Rameshwar* v. *Lachmi Prosad* (1904) 31 Cal. 111; *Saraju Bala* v. *Jyotirmoyee* (1931) 58 I. A. 270, 59 Cal. 142, 134 I.C. 648, ('31) A.PC. 179; *Umrao Singh* v. *Baldeo Singh* (1933) 14 Lah. 353, 143 I.C. 615, ('33) A.L. 201

(*p*) *Mokoondo Lall* v. *Gonesh Chunder* (1876) 1 Cal. 104; *Raikishori* v. *Debendranath*, *supra*.

(*q*) *Cally Nath* v. *Chunder Nath* (1882) 8 Cal. 378; *Motivahu* v. *Mamubai* (1895) 19 Bom. 647.

(*r*) *Gosavi Shivgar* v. *Rivett Carnac* (1889) 13 Bom. 463; *Husenbhoy* v. *Ahmedbhoy* (1902) 26 Bom. 319 [case of Khojas]. See also (1882) 8 Cal. 378, *supra*; *Mussammat Ram Kuar* v. *Atma Singh* (1927) 8 Lah. 181, 103 I.C. 606, ('27) A. L. 404.

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The rule laid down in this section is based on the decision in *Gosling* v. *Gosling* (s), which is the leading English case on the subject. The same rule has been applied to cases governed by the Indian Succession Act, 1925 (t).

395. Gift of income without limit of time.—Where a gift is made of the income, but the estate given is not in terms limited to the lives of the beneficiaries, nor is any line of descent provided after their deaths, the gift is an absolute gift (*u*).

396. Immoral conditions.—A gift to which an immoral condition is attached remains a good gift, while the condition is void (*v*).

397. Direction for accumulation.—(*1*) Where the terms of a *transfer of property* direct that the income arising from the property shall be accumulated either wholly or in part during a period longer than—

(a) the life of the *transferor*, or

(b) a period of eighteen years from the date of the transfer,

such direction shall, save as hereinafter provided [Sub-sec. (*3*)], be void to the extent to which the period during which the accumulation is directed exceeds the longer of the aforesaid periods, and at the end of such last-mentioned period the property and the income thereof shall be disposed of as if the period during which the accumulation has been directed to be made had elapsed.

(*2*) Where the terms of a *will* direct that the income arising from any property shall be accumulated either wholly or in part during any period longer than a period of eighteen years from the death of the *testator*, such direction shall, save as hereinafter provided [sub sec. (*3*)], be void to the extent to which the period during which the accumulation is directed exceeds the aforesaid period, and at the end of such period of eighteen years the property and the income thereof shall be disposed of as if the period during which the accumulation has been directed to be made had elapsed.

(*3*) This section shall not affect any direction for accumulation for the purpose of—

(i) the payment of the debts of the *transferor* or the *testator* or any other person taking any interest under the *transfer* or *will*, or

(s) (1859) Johns, 265.
(t) *Lloyd* v. *Webb* (1897) 24 Cal. 44.
(u) *Madhavrao* v. *Balabhai* (1928) 55 I. A. 74, 52 Bom. 176, 107 I.C. 119, ('28) A. PC. 33.
(v) *Ram Sarap* v. *Bela* (1884) 6 All. 313, 11 I.A. 44. Cf. Transfer of Property Act, 1882, s. 25.

(ii) the provision of portions for children or remoter issue of the *transferor* or of the *testator* or of any other person taking any interest under the *transfer* or *will* or S. 397

(iii) the preservation or maintenance of the property transferred ;

and such direction may be made accordingly.

Sub-sec. (*1*) of this section is sub-sec. (*1*) of sec. 17 of the Transfer of Property Act, 1882, as amended by the Transfer of Property (Amendment) Act 20 of 1929, sec. 10. Sec. 17 is one of the sections of Chapter II of the Transfer of Property Act, and that Chapter now applies to Hindus also.

Sub-sec. (*2*) of this section is sub-sec. (*1*) of s. 117 of the Indian Succession Act, 1925, as amended by the Transfer of Property (Amendment) Supplementary Act 21 of 1929, s. 14 (*3*) By s. 14 (*4*) of the same Act, s. 117 as amended was included in Schedule III to the Indian Succession Act, so as to apply to Hindu wills also.

Sub-sec. (*3*) of this section is a combination of sub-sec. (*2*) of s. 17 of the Transfer of Property Act and sub-sec. (*2*) of s. 117 of the Indian Succession Act.

Both the amending Acts came into force on the 1st April, 1930. All transfers and wills executed before that date will still be governed by the rule of Hindu law as it was before those Acts. We proceed to state that rule.

Religious endowments.—The rules stated in this section do not apply to religious endowments. See sec. 411A below.

Rule of Hindu law before legislation.—Whether a direction for accumulation is valid or not, is a question which depends upon the facts of each case. No hard and fast rule can be laid down, in each case the particular direction must be examined to see what the object of the testator was and what the effect of carrying out the direction would be. If there is nothing *per se* illegal in a direction to accumulate made in a transfer *inter vivos* or a will, and if such direction is neither so unreasonable in its conditions as to be void against public policy, nor given for the purpose of carrying out an illegal object nor in its effect inconsistent with Hindu law, effect should be given to the direction (*w*).

The period during which an accumulation can be validly directed is the period for which the absolute vesting of the entire interest can be withheld, or for so long a time as that during which the corpus of the property can be rendered inalienable or its course or its devolution can be directed and controlled by a testator (*x*).

Illustrations to the above rule.

(a) *Where the object is to create a perpetuity.*—Where there is no disposition of the beneficial interest in the property of which the income is directed to be accumulated and the direction to accumulate is an attempt to *create a perpetuity* as in the case put in the illustration to s. 393, the direction is invalid, and the property will pass as on intestacy: *Shookmoy Chandra* v. *Monoharri Dassi* (*y*), *Kumari Asima* v *Kumara Krishna* (*z*).

(b) *Where the direction to accumulate is repugnant to the grant.*—Where there is a *present* gift of property to a person, but the gift is followed by provisions postponing payment and directing accumulation, such provisions are invalid, and the donee is entitled to receive the property as if there were no such directions in the deed of gift or will. The reason is that an absolute gift cannot be qualified by a direction to postpone

(*w*) *Rajendra Lall* v. *Raj Coomari* (1907) 34 Cal. 5. See also *Benode Behari* v. *Nistarini Dassi* (1905) 32 I.A. 193, 33 Cal. 180, and the cases cited in the illustrations.

(*x*) *Watkins* v. *Administrator-General of Bengal* (1920) 47 Cal. 88, 93, 56 I. C. 376, ('20) A.C. 951.

(*y*) (1885) 11 Cal. 684, 12 I.A. 103.

(*z*) (1868) 2 Beng. L. R. O. C. 11, 37.

Ss. 397, 398 payment and to accumulate: *Cally Nath* v. *Chunder Nath* (*a*); *Bramamayi* v. *Jages Chandra* (*b*); *Mokoondo Lall* v. *Gonesh Chunder* (*c*).

(c) *Accumulation for payment of debts or for benefit of minors.*—A direction to accumulate for the payment of debts, or for the benefit of minor donees, is not invalid: *Amrito Lall* v. *Surnomoni* (*d*).

(d) *Accumulation for charitable purposes.*—A direction to accumulate the income of property for a charitable purpose is not invalid. It has accordingly been held that a direction to accumulate the income of property until it amounted to Rs. 10,000 and then to spend the proceeds in feeding the poor is valid: *Rajendra Lall* v. *Raj Coomari* (*e*) See s. 411 below.

(dd) *Accumulation for marriage expenses.*—A direction to accumulate for the purpose of providing for the marriage expenses of the testator's son is valid: *Nafar Chandra* v. *Ratan* (*f*).

(e) *Where the direction is in its effect inconsistent with Hindu law.*—A Hindu bequeathed his property to trustees upon trust to pay a fixed monthly sum to his wife during her life, and to accumulate the surplus until the death of his wife. The testator also authorised his wife and two other persons to adopt a son, with a direction that neither the *corpus* nor the accumulations were to be handed over to the adopted son until the death of his wife. *B*, alleging that he was adopted to the testator pursuant to the authority given by him, contended that the direction for accumulation till the death of the widow was void, and claimed immediate possession of the *corpus* and the accumulations, subject to the payment to the widow of the monthly sum directed to be paid to her under the will. Jenkins, J., held that the adoption was proved, but that the direction to accumulate was valid and that the plaintiff was not entitled to possession until the death of the widow. The learned Judge said: "It appears to me, on principle that, if accumulations are permissible, then in the absence of special provision, the limit must be that which determines the period during which the course or devolution of property can be directed and controlled by a testator." The learned Judge added: "It is true that the object of the testator's bounty is not ascertained *at the testator's death* [for the son was to be adopted *after* his death], but that in itself is not a necessary indication of *illegal* remoteness": *Amrito Lall* v. *Surnomoye* (*g*). On appeal, it was held that the adoption was invalid and it therefore became unnecessary to consider the validity of the direction for accumulation. Trevelyan, J., however, said: "I cannot see how a direction to accumulate can be valid unless there be a *present* gift to support the direction to accumulate": *Amrito Lall* v. *Surnomoye* (*h*). The Judicial Committee agreed with the Appelate Court that the adoption was invalid and declined to enter upon the other question: *Amrito Lall* v. *Surnomoye* (*i*). Referring to the observation of Trevelyan, J., Sir Lawrence Jenkins said in a later case which related to the same will: "I do not clearly understand what the learned Judge here intended to lay down," and his Lordship reiterated the views expressed in the earlier judgment.

Accumulation to follow capital.—In the absence of any direction to the contrary it is the rule of Hindu law that accumulations go with the capital (*j*).

398. Power of appointment.—A Hindu may, by deed or will, grant a power of appointment to a person or persons named in

(*a*) (1882) 8 Cal. 378.
(*b*) (1871) 8 Beng. L. R. 400.
(*c*) (1875) 1 Cal. 104.
(*d*) (1898) 25 Cal. 662, 691.
(*e*) (1907) 34 Cal. 5.
(*f*) (1910) 15 C. W. N. 66, 7 I.C. 921.
(*g*) (1897) 24 Cal. 589, 618.
(*h*) (1898) 25 Cal. 662, 673, 690-691.
(*i*) (1900) 27 Cal. 996, 27 I.A. 128.
(*j*) *Bissonauth* v. *Bamasoondery* (1867) 12 M.I.A. 41, 60; *Sonatun* v. *Juggutsoondree* (1859) 8 M.I.A. 66 [where there was a direction to the contrary].

the will. Before the Hindu Transfers and Bequests Act, 1914, the Hindu Disposition of Property Act, 1916, and the Hindu Transfers and Bequests (City of Madras) Act, 1921, it was necessary to the valid exercise of the power that it should be exercised in favour of a person who was in existence either actually or in contemplation of law at the date of the gift or at the testator's death, as the case might be (*k*). Since the passing of those Acts, the power may be exercised in favour even of an unborn person subject, however, to the limitations and provisions contained in those Acts [see ss. 383-387].

When an appointment is made pursuant to a power in favour of two or more persons, and the appointment is invalid as to some or one of them, it may still be valid as to the rest (*l*).

Illustration.

X by his will gives certain property to *A* for life, and at his death to *A*'s sons, but if *A* dies without male issue, then to such persons as *A* may by deed or will appoint. *A* has no male issue. *A*, in the exercise of the power, leaves the property by his will to his own daughters *C* and *D* to be divided equally between them. *C* was in existence at the death of the testator. *D* was born *after* the death of the testator, *C* is entitled to a moiety of the property. *D* is not entitled to anything, as she was born after the death of *X*. The share appointed by *A* to *D* will go to the heirs of *X* as on intestacy: *Javerbai* v. *Kablibai* (1892) 16 Bom. 492. [Under the Hindu Disposition of Property Act, 1916, the execution of the power in favour of *D*, though not in existence at the death of the testator, would be valid].

The leading case on the subject is that of *Motivahu* v. *Mamubai* (*m*), decided by the Privy Council in the year 1897. In that case it was contended that there was no place for a power of appointment in the Hindu system of law. As to this the Judicial Committee said that as *X* could himself have designated the person who was to take the property in the event of *A* dying without sons, there was nothing to prevent *X* from substituting *A* for himself and giving him power to designate the person who was to take in the aforesaid event. But to render the gift valid, the taker so designated must have been in existence at the death of *X* for he takes the property not from the donee of the power, but from *X*. At the same time the Committee observed that in their opinion the English law of power was *not fit to be applied generally* to Hindu wills. It has already been pointed out that in cases governed by the Hindu Disposition of Property Act, 1916, the taker need not be in existence at the death of *X*.

399. Caution against applying English rules.—" English rules of construction have grown up side by side with a very special law of property and a very artificial system of conveyancing . . . . It is a very serious thing to use such rules in interpreting the instruments of Hindus, who view

(*k*) *Motivahu* v. *Mamubai* (1897) 21 Bom. 709, 24 I.A. 93; *Upendra Lal* v. *Hemchundra* (1898) 25 Cal. 405; *Monorama* v. *Kalicharan* (1904) 31 Cal. 166; *Brij Lal* v. *Suraj Bikram* (1912) 39 I.A. 150, 34 All. 405, 16 I.C. 92; *Mahim Chandra* v. *Hara Kumari* (1915) 42 Cal. 561, 569, 30 I.C. 798, ('15) A.C. 487.

(*l*) *Javerbai* v. *Kablibai* (1892) 16 Bom. 492.

(*m*) (1897) 21 Bom. 709, 24 I.A. 93.

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most transactions from a different point, think differently and speak differently from Englishmen" (*n*).

400. Gift or bequest to two or more persons.—(*1*) Where a gift or bequest is made to two or more persons, the question arises whether they take as tenants-in-common or as joint tenants or as coparceners.

If the donees or legatees take as tenants-in-common, the share of each will on his death pass to his heirs by *succession.* If they take as joint tenants, the undivided interest of each donee will pass on his death by *survivorship.* If they take as coparceners, the undivided coparcenary interest of each donee will pass on his death by survivorship, and, further, the male issue of each donee will acquire an interest by birth in the property as if it were coparcenary property. [Note that the question whether the donees or legatees take as *coparceners* can only arise when they are members of a coparcenary. The reason is that a coparcenary is purely a creature of law; it cannot be created by an act of parties (see s. 215)].

(*2*) Where a gift or bequest is made to two or more persons *who are not members of a coparcenary* without specification of shares, it has been held by the Judicial Committee that they take as tenants-in-common, and not as joint tenants (*o*). In the course of the argument in that case it was contended on the authority of a Madras case (*p*), that where a bequest was made to two or more persons without specification of shares, the presumption was that they took the property as joint tenants, but their Lordships of the Privy Council held that that case was not rightly decided, and said: "It appears to their Lordships that the learned Judges of the High Court of Madras were not justified in importing into the construction of a Hindu will an extremely technical rule of English conveyancing. The principle of joint tenancy appears to be unknown to Hindu law, *except in the case of a coparcenary between the members of an undivided family.*"

Illustrations.

(a) A Hindu bequeaths his property to his widow and her son for their maintenance *with power to them to alienate* the property by sale or gift. Here the legatees take as

(*n*) Per Wilson, J., in *Ram Lal Sett* v. *Kanai Lall Sett* (1886) 12 Cal. 663, 678, approved by the P.C. in *Bhagabati* v. *Kalicharan* (1911) 38 Cal. 468, 38 I.A. 54, 10 I.C. 641; *Narasimha* v. *Parthasarathy* (1914) 37 Mad. 199, 222, 41 I.A. 51, 71, 23 I.C. 166.

(*o*) *Jogeswar Narain* v. *Ram Chandra Dutt* (1896) 23 Cal. 670, 23 I.A. 37.

(*p*) *Vydinada* v. *Nagammal* (1888) 11 Mad. 258.

tenants-in-common, and each takes an absolute interest in a moiety of the property, so that on the death of either of them his or her share will pass to his or her heirs *by succession* (q).

(b) A Hindu bequeaths his property to his two married daughters without specification of shares. The legatees take as tenants-in-common, and not as joint tenants (r).

(c) A Hindu bequeaths his property to his daughter and her husband without specification of shares. The legatees take as tenants-in-common (s).

(3) Where a gift or bequest is made to two or more persons *who are members of a coparcenary*, they nevertheless take as tenants-in-common, and not as joint tenants or coparceners, unless a contrary intention appears from the grant.

Illustrations.

(a) A Hindu executes a deed of gift by which he gives his property to *A* and *B* who are brothers and members of a joint Hindu family. The Bombay High Court held that the donees take as tenants-in-common, and on the death of either of them his share will pass to his heirs *by succession* (t). In the course of the judgment Fulton, J., said: "If an unexpressed intention could be presumed, it would, we think, be more reasonable to suppose that the gift was meant to be to the two brothers as *coparceners*; but we doubt whether such a gift could be made consistently with the principles of *Tagore* case for a gift in *coparcenary* would purport to create interests in sons and grandsons who might be *unborn at the time.*"

(b) A Hindu father bequeaths *a house* to his three sons in these terms: "Therefore, my three sons shall use and enjoy the house from son to grandson and so on in succession without power to give as gift or sell the same." As regards *his other properties*, he directs the income thereof to be divided among his sons "*in equal shares*," and the *corpus* to be divided among his grandson after the death of his sons "*according to their respective shares.*" One of the sons dies leaving a son, who dies leaving a widow. The widow claims a third share of the house, alleging that the three sons took the house as tenants-in-common. On the above facts it was held by the High Court of Madras that the sons took the house as a Hindu coparcenary with rights of survivorship, and that on the death of any one of them without leaving male issue and without partitioning the property, the property passed to the survivors, and that the widow could claim no share in it. Subramania Ayyar, J., said: "In cases like the present, the question for determination is but one of *intention* to be ascertained with reference to the terms of the particular will. If the grant is to persons who are incapable of forming a joint Hindu family, they can of course take only as tenants-in-common. If, on the contrary, the grant is to persons who constitute such a family, even then it may be that the *prima facie* view is that they take in severalty and that those who argue in favour of the opposite construction have to show some clear foundation for it in the terms of the will. Of course, the donees here, the sons, were persons who could be, and were, members of a joint family.... And as to the terms of the gift they are clear to the effect that the donees were to take not in severalty but in coparcenary. That the distinction between the two was perfectly clear to the mind of the testator is beyond question, for where he wishes them to take as tenants-in-common, he uses apt expressions, as the word 'in equal shares' in the paragraph relating to the income, and 'according to their respective shares' in the paragraph

(q) *Jogeswar Narain* v. *Ram Chandra Dutt, supra.*

(r) *Gopi* v. *Musammat Jaldhara* (1911) 33 All. 41, 7 I.C. 697.

(s) *Mst. Jio* v. *Mst. Rukman* (1927) 8 Lah. 219, 100 I.C. 54, ('27) A.L. 126.

(t) *Bai Diwali* v. *Patel Bechardas* (1902) 26 Bom. 445; *Kishori Dubain* v. *Mundra Dubain* (1911) 33 All. 665, 10 I.C. 565; *Babu Rani* v. *Rajendra Baksh Singh* (1933) 8 Luck. 121, 60 I.A. 95, 142 I.C. 3, ('33) A.PC. 72; *Ram Piari* v. *Krishna Piari* (1921) 43 All. 600, 63 I.C. 301, ('21) A.A. 50. [Gift to daughter's sons.]

Ss. 400, 401

relating to the division of the *corpus* of [the other properties], while with reference to the house under consideration he directs common enjoyment without any possibility of division" (*u*).

(c) *A* and his sons are members of a coparcenary. *A*'s brother *B* bequeaths certain property to *A* and *A*'s sons in these terms: "Items 4, 5, 6, 7, 8 and 9, I bequeath and leave to my brother *A* and his sons." The legatees, though members of a coparcenary, take as tenants-in-common, there being no express words in the will that they should take as members of a coparcenary (*v*).

401. Gifts and bequests to widows, daughters and other females.—(*1*) *Absolute gift and limited gift.*—When property is given to a female by a deed or will, the question frequently arises whether the gift passes an estate of inheritance, that is, an absolute estate, or merely a limited estate. If a gift made to a female, *e.g.*, the mother, daughter, brother's daughter, sister, etc., passes an estate of inheritance, she can dispose of it at her pleasure (*w*), but not if it passes a limited estate (*x*). In the former case, the property passes on her death intestate to her stridhana heirs (*y*); in the latter case, it passes to the donor's heirs (*z*). The same rule applies where a gift is made by a *husband* to his *wife*, whether the gift be of moveable or of immoveable property. If the gift passes an absolute estate she can dispose of the property at her pleasure by act *inter vivos* or by will (*a*), but not if it passes a limited estate (*b*). In the former case the property passes on her death intestate to her stridhana heirs (*c*); in the latter case, it passes to her husband's heirs (*d*).

(*u*) *Yethirajulu* v. *Mukunthu* (1905) 28 Mad. 363, 373. See also *Sonatun* v. *Juggut-soondree* (1859) 8 M.I.A. 66; *Bissonauth* v. *Bamasoonderry* (1867) 12 M.I.A. 41.

(*v*) *Janakiram* v. *Nagamony* (1926) 49 Mad. 98, 93 I.C. 662, ('26) A.M. 273.

(*w*) *Atul* v. *Sanyasi* (1905) 32 Cal. 1051 [bequest to mother]; *Lala Ramjewan* v. *Dal Koer* (1897) 24 Cal. 406 [bequest to daughters and brothers' daughters]; *Kollany* v. *Luchmee* (1875) 24 W. R. 395 [gift to daughter]; *Madavarayya* v. *Tirtha* (1877) 1 Mad. 307 [gift to daughter].

(*x*) *Mahomed Shumsool* v. *Shewukram* (1874) 2 I.A. 7, 14 Beng. L.R. 226 [gift to daughter-in-law]; *Radha Prasad* v. *Ranee Mani* (1908) 35 Cal. 896, 38 I.A. 118 [bequest to daughter]. In both these cases it was held that the donee took a limited estate only.

(*y*) *Ramasami* v. *Papayya* (1893) 16 Mad. 466 [gift to daughter]; *Basanta* v. *Ramikshya* (1906) 33 Cal. 23, 32 I.A. 81 [gift to sister —Dayabhaga case].

(*z*) *Annaji* v. *Chandrabai* (1893) 17 Bom. 503.

(*a*) *Surajmani* v. *Rabi Nath* (1908) 30 All. 84, 35 I.A. 17 [will upheld]; *Fateh Chand* v. *Rup Chand* (1916) 43 I.A. 183, 38 All. 446, 37 I.C. 122, ('16) A.PC. 20 [will upheld]; *Ramachandra* v. *Ramachandra* (1919) 42 Mad. 283, 291-292, 52 I.C. 94; ('19) A.M. 557 [will upheld]; *Janki* v. *Bhairon* (1897) 19 All. 133 [will upheld]; *Padan Lal* v. *Tek Singh* (1907) 29 All. 217 [mortgage upheld]; *Damodar* v. *Purmanandas* (1883) 7 Bom. 155 [will upheld—case of moveable property]. In some of the earlier cases, it was held that a wife cannot dispose of immoveable property given to her by her husband to the prejudice of her *stridhana* heirs, *even if the gift was absolute* not even after her husband's death. That view, it is submitted, is no longer law. The cases above referred to are *Kotarbasappa* v. *Chanverova* (1873) 10 Bom. H. C. 403; *Gangadaraiya* v. *Parameswaramma* (1869) 5 Mad. H. C. 111; *Bhujanga* v. *Ramayamma* (1884) 7 Mad. 387; *Nunnu Meah* v. *Krishnaswami* (1891) 14 Mad. 274. See also *Rudr. Narain* v. *Rup Kuar* (1878) 1 All. 734, at pp. 743-744.

(*b*) *Jamna Das* v. *Ramautar* (1905) 27 All. 364 [mortgage set aside]; (1891) 14 Mad. 274, *supra* [sale set aside].

(*c*) *Kesserbai* v. *Hunsraj* (1906) 30 Bom. 431, 33 I.A. 176.

(*d*) *Harilal* v. *Bai Rewa* (1897) 21 Bom. 376.

(2) *Mahomed Shumsool* v. *Shewukram* (*1874*) *2 I.A. 7, 14 Beng. L.R. 226*.—Whether a gift passes an absolute or a limited estate depends on the terms of the grant in each case (*e*). This is so not only under the Hindu law, but under all other systems of law in force in British India. In the case, however, of a *gift or devise made to a Hindu female by her relations*, the Judicial Committee has laid down that in construing a deed of gift or a will made by a Hindu in favour of *female relations*, the Court is entitled to assume that the donor intended the donee to take a *limited estate only*, unless the contrary appears from the deed or will. The basis of the rule is that females as a rule take a limited estate only in property inherited by them from male relations, and the donor must be presumed to have made the gift with that fact present to his mind. The leading case on the subject is *Mahomed Shumsool* v. *Shewukram* (*f*). In that case their Lordships of the Privy Council said: "In construing the will of a Hindu it is not improper to take into consideration what are known to be the ordinary notions and wishes of Hindus, with respect to the devolution of property. It may be assumed that a Hindu.....knows that, as a general rule, at all events, women do not take absolute estates of inheritance which they are enabled to alienate." **S. 401**

Though the rule laid down by the Privy Council applies alike to all females who take a limited estate in property inherited by them, the Courts in India have, following the spirit of the texts cited in sec. 141, drawn a distinction between cases where a gift or devise of *immoveable* property has been made by a Hindu husband *to his wife*, and those where it is made by a Hindu to other females. In the former case, that is, where a gift is made by a husband to his wife, they start with a presumption against the gift being absolute, and hold that the gift must be presumed to pass a limited estate, unless by express words or necessary implication an absolute estate is expressed to be conveyed (*g*). In the latter case, that is, where a gift is

(*e*) *Ram Narain* v. *Pearay* (1883) 9 Cal. 830

(*f*) (1874) 2 I.A. 7, 14-15, 14 Beng. L.R. 226, 231 [bequest to daughter-in-law held, to pass a limited estate]; see also *Rabutty* v. *Sibchunder* (1854) 6 M.I.A. 1 [deed of family arrangement].

(*g*) *Harilal* v. *Bai Rewa* (1897) 21 Bom. 376 [bequest to widow—limited estate]; *Jamna Das* v. *Ramautar* (1905) 27 All. 364 [gift to wife—limited estate]; *Seshayya* v. *Narasamma* (1899) 22 Mad. 357 [bequest to widow—limited estate]; *Hirabai* v. *Lakshmibai* (1887) 11 Bom. 573 [bequest to widow—limited estate]; *Nunnu Meah* v. *Krishnaswami* (1891) 14 Mad. 274; *Motilal* v. *Advocate-General of Bombay* (1911) 35 Bom. 279, 11 I.C. 547; *Janki* v. *Bhairon* (1897) 19 All. 133 [bequest to widow—absolute estate]; *Padam Lal* v. *Tek Singh* (1907) 29 All. 217, dissenting from *Surajmani* v. *Rabi Nath* (1903) 25 All. 351.

S. 401 made to other female relations, *e.g.*, a mother (*h*), they do not in all cases start with that presumption. But there is nothing in *Mahomed Shumsool's* case to justify this distinction. The rule there laid down purports to apply to all females who take a limited estate in property inherited by them. In fact, the Judicial Committee applied it in a later case where a bequest was made to a *daughter* (*i*). The case was one from Bengal where daughters take a limited estate. It is, therefore, difficult to support the distinction made by the High Courts. The Madras High Court applied this rule in a case where a father gave on partition a share to a widowed daughter who was without children (*k*). But the presumption is weaker where the property given is moveable property (*l*). The rule was held not applicable to a case where there is no gift by the husband to the wife but where the widow got the property as a result of a compromise with her relations (*m*). The principle of *Mahomed Shumsool's* case applies not only to wills mentioned in clauses (a) and (b) of s. 57 of the Indian Succession Act, 1925 [see s. 369 above], but to all other wills (*n*).

(3) *Gift to a woman as "malik"*.—In most of the cases referred to above, the High Courts interpreted the rule in *Mahomed Shumsool's* case to mean that a gift of *immoveable* property to a woman cannot be deemed to confer upon her an absolute estate of inheritance which she could alienate at her pleasure unless the deed or will gave her in *express terms* a heritable estate or power of alienation. But there was no warrant for such an interpretation. In fact later decisions of the Judicial Committee have made it clear "that if words [are] used conferring absolute ownership upon the wife, the wife enjoys the rights of ownership [including a full right of alienation] *without their being conferred by express and*

(*h*) *Atul* v. *Sanyasi* (1905) 32 Cal. 1051. In *Annaji* v. *Chandrabai* (1893) 17 Bom. 503 the gift was by a son to his mother and the Court started with the presumption against the gift being absolute, and held that it passed a limited estate only.

(*i*) *Radha Prasad* v. *Ranee Mani* (1908) 35 Cal. 896, 90, 35 I.A. 118, 129 [held that the daughters took a limited estate only]. In *Ammannama* v. *Kodanda Rao* (1940) Mad. 223, 190 I.C. 190, ('40) A.M. 210, (1940) 1 M.L.J. 188, it was held that the daughter took "a limited estate of a daughter" and the daughter's sons' interest, if any, was not vested remainder.

(*k*) *Mangamma* v. *Doraiya* (1937) Mad. 335, 166 I.C. 59, ('37) A.M. 100.

(*l*) *Koonjbehari* v. *Premchand* (1880) 5 Cal. 684.

(*m*) *Pandit Adya Shankar Tewari* v. *Mst. Chandravati* (1935) 10 Luck. 35, 150 I.C. 519, ('34) A.O. 265.

(*n*) *Radha Prasad* v. *Ranee Mani* (1908) 35 Cal. 896, 903, 35 I.A. 118, 130 [bequest to daughter—limited estate]; *Bhoba* v. *Peary Lal* (1897) 24 Cal. 646, 650-651 [bequest to widow—limited estate]; *Caralapathi* v. *Cota* (1910) 33 Mad. 91, 93, 3 I.C. 475 [bequest to widow—limited estate]. In *Saroda* v. *Kristo* (1900) 5 C.W.N. 300, the Court proceeded upon the plain meaning of sec. 82 of the Succession Act, and held that the bequest to the widow was absolute.

additional terms, unless the circumstances or the context were sufficient to show that such absolute ownership was not intended " (*o*) or that it was possible by the use of words of sufficient amplitude to convey in the term of gift itself the fullest rights of ownership including the power to alienate which the High Court thought were required to be added by express declaration (*p*). These decisions may be divided into two classes, namely— **S. 401**

(a) Where the gift is coupled with a power of alienation.

(b) Where the word " malik " (owner), or other words importing *absolute ownership*, are used in the deed or will.

In case (a), that is, where a gift is coupled with a power of alienation, the Court readily infers an intention to grant an absolute estate. Thus where a testator bequeathed certain property to his daughter and her son " for your maintenance " *with power of making alienation thereof by sale or gift*, it was held by their Lordships of the Privy Council that each of them took an absolute interest in a moiety of the property, and the words " for your maintenance " did not reduce the interest of either of them to one for life only (*q*).

The second class of cases is the one where the word " malik " (owner) or other words importing *absolute ownership* are used in the deed or will. The word " malik " (owner) imports full proprietary rights including a full right of alienation *unless* there is something in the context or in the surrounding circumstances to indicate that full proprietary rights were not intended to be conferred. Hence it has been held that words of disposition in a deed of gift (*r*) or will that the donee shall "become *malik* (owner) of all my properties," or similar words, confer

(*o*) *Bhaidas* v. *Bai Gulab* (1922) 49 I.A. 1, 7, 46 Bom. 153, 159, 65 I.C. 974, ('22) A.PC. 193.

(*p*) *Ramachandra* v. *Ramachandra* (1919) 45 Mad. 320, 49 I.A. 129, 67 I.C. 408, ('22) A.PC. 80; *Narsingh Rao* v. *Mahalakshmi Bai* (1928) 55 I.A. 180, 50 All. 375, 109 I.C. 703, ('28) A.PC. 156; *Shalig Ram* v. *Charanjit Lal* (1930) 57 I.A. 282, 11 Lah. 645, 128 I.C. 265, ('30) A.PC. 239 [*waris*, *i.e.*, heir]; *Jagmohan Singh* v. *Sri Nath* (1930) 57 I.A. 291, 128 I.C. 270, ('30) A.PC. 253 [gift to wife to be enjoyed by her *generation after generation*]; *Krishnaswami Ayyar* v. *Ramachandra Rao* (1934) 67 Mad. L. J. 821, 158 I.C. 1005, ('34) A.M. 646; *Shivappa Rudrappa* v. *Rudrava Chambasappa* (1933) 57 Bom. 1, 142 I.C. 164, ('32) A.B. 410.

(*q*) *Jogeswar Narain* v. *Ramchandra Dutt* (1896) 23 Cal. 670, 23 I.A. 37; *Kesserbai* v. *Hunsraj* (1906) 30 Bom. 431, 442, 33 I.A. 176, 186-187.

(*r*) *Bishnath Prasad Singh* v. *Chandika Prasad Kumari* (1933) 55 All. 61, 60 I.A. 56, 142 I.C. 6, ('33) A.PC. 67.

S. 401 an *heritable and alienable* estate in the absence of a context which indicates a different meaning (*s*).

It has been stated above that a bequest to a woman as "malik" imports full proprietary rights *unless* there is something in the context to qualify it. In the under-mentioned cases (*t*), it was held that the context cut down the absolute estate imported by the word "malik", and that the donee did not take an absolute estate.

In *Bhaidas* v. *Bai Gulab* (*u*) a testator (1) constituted his wife, "malik" (owner) of his property, and (2) provided that she should leave "whatever property might remain after her death" to two named daughters "as she liked." Their Lordships of the Privy Council held that the widow took an ansolute estate, the second clause not constituting a trust in favour of the daughters as the subject-matter—namely, what might remain—was uncertain. Similarly where a Hindu transferred by way of gift to his wife "all my zamindari rights" with power to enter into possession and spend the produce of the property *ba farzandan naslan bad naslan* (lit., with sons generation after generation), it was held that the words "spend the produce" did not indicate that she was given a life-estate only (*v*). The word Malik in a wajib-ul-arz when used with reference to widows and qualified by words like 'tahayat' does not indicate an absolute estate (*w*). Where a testator gives a full estate to one person, he is not entitled to make a gift over in favour of any one else (*x*).

(*4*) *Where terms of grant unknown.*—There is no presumption that a gift by a husband to his wife is by way of *stridhana*, in other words, that it is an *absolute* gift. Therefore, when a Hindu widow under grant from her husband had enjoyed the revenue of a village for many years, but the terms of the grant

(*s*) *Lalit Mohun* v. *Chukkun Lal* (1897) 24 Cal. 834, 24 I.A. 76, 83-89; *Surajmani* v. *Rabinath* (1908) 30 All. 84, 35 I.A. 17; *Fateh Chand* v. *Rup Chand* (1916) 43 I.A. 183, 38 All. 446, 37 I.C. 122, ('16) A.PC. 20 [*Malik-o-qabiz, i.e.*, owner in possession]; *Sasiman* v. *Shib Narayan* (1922) 49 I.A. 25, 35, 1 Pat. 305, 315, 66 I.C. 193, ('22) A PC. 63 [*Malikiyati*]; *Saraju Bala* v. *Jyotir Moyee* (1931) 58 I.A. 270, 59 Cal. 142, 134 I.C. 648, ('31) A.PC. 179 [gift to daughter as *malik*]; *Hitendra Singh* v. *Maharaja of Darbhanga* (1928) 55 I.A. 197, 7 Pat. 500, 109 I.C. 858, ('28) A.PC. 112 [to hold the property *from generation to generation*]; *Lala Ramjeewan* v. *Dal Koer* (1897) 24 Cal. 406, 409; *Aulakhi* v. *Jai Kishan* (1918) 40 All. 575, 46 I.C. 905, ('18) A.A. 255 [*Malik Mustaquil*]; *Kesserbai* v. *Hunsraj* (1906) 30 Bom. 431, 442, 33 I.A. 176, 186-187; *Wazir Devi* v. *Ram Chand* (1920) 1 Lah. 415, 58 I.C. 988 [*Kulliikhtiyar wamilkiat*]; *Mohan Lal* v. *Niranjan Das* (1921) 2 Lah. 175, 60 I.C. 619, ('21) A.L. 11 [*Malik*]; *Hitendra Singh* v. *Rameshwar Singh* (1925) 4 Pat. 510, 87 I.C. 849, ('25) A.P. 625 [transfer to wife of "all my zamindari rights" with power to enter into possession and spend the produce of the property *ba farzandan naslan bad naslan*, *i.e.*, with sons generation after generation]; *Thakur Jagmohan* v. *Musammat Sheoraj* (1928) 3 Luck. 19, 106 I.C. 593, ('28) A.O. 49 [F.B.]; *Mussammut Ram Kuar* v. *Atma Singh* (1927) 8 Lah. 181, 103 I.C. 506, ('27) A.L. 404; *Kamla Prasad* v. *Murli Manohar* (1934) 13 Pat. 550, 152 I.C. 446, ('34) A.P. 398; *Matru Mal* v. *Meheri Kunwar* (1940) All. 416, 189 I.C. 600, ('40) A.A. 311; *Haripada Ojha* v. *Ichhamayee Devi* (1944) 23 Pat. 401.

(*t*) *Mahomed Shumsool* v. *Shewukram* (1875) 2 I.A. 7, 14 Beng. L.R. 226; *Motilal* v. *Advocate-General of Bombay* (1911) 35 Bom. 279, 11 I.C. 547 [widow's estate]; *Mithibai* v. *Meherbai* (1922) 46 Bom. 162, 64 I.C. 397, ('22) A.B. 170, [life-estate]; *Ashurfi Singh* v. *Biseswar* (1922) 1 Pat. 295, 65 I.C. 977, ('22) A.P. 362 [widow's estate]; *Basant Kumar Basu* v. *Ramshankar Roy* (1932) 59 Cal. 859, 138 I.C. 882, ('32) A.C. 600.

(*u*) (1922) 49 I.A. 1, 46 Bom. 153, 65 I.C. 974, ('22) A.PC. 193.

(*v*) *Hitendra Singh* v. *Rameswar Singh* (1925) 4 Pat. 510, 519, 87 I.C. 349, ('25) A.P. 625.

(*w*) *Tirbeni Sahai* v. *Ramsingh* (1938) 13 Luck. 230, 167 I.C. 925, ('37) A.O. 361.

(*x*) *Matru Mal* v. *Maheri Kunwar* (1940) All. 416, 189 I.C. 597, ('40) A.O. 311.

were unknown, and the widow claimed the compensation awarded for the village under the Land Acquisition Act, 1894, it was held by the Privy Council that there being no evidence to show that the grant was absolute, she had failed to establish an absolute title (*y*). See sec. 140 above. **S. 401**

(*y*) *Braja Kisora* v. *Kundana Devi* (1899) 22 Mad. 431, 26 I.A. 66. See *Ramasami* v. *Papayya* (1893) 16 Mad. 466 [not good law].

CHAPTER XXI.

RELIGIOUS AND CHARITABLE ENDOWMENTS.

Ss. 404, 405

404. Endowments.—A Hindu who is of sound mind, and not a minor, may dispose of his property by gift or by will for religious and charitable purposes such as the establishment and worship of an idol (*z*), feeding Brahmans and the poor (*a*), performance of religious ceremonies like sraddha, durga pujah and lukshmi pujah (*b*), and the endowment of a university (*c*) or an hospital (*d*). When the question is whether the endowment is real or fictitious the mode of dealing with it by its donors and successors is an important element for consideration (*e*).

Doubt as to certain gifts.—The High Court of Calcutta has expressed a doubt as to whether gifts to Pundits holding *tolls* for learning in the country at the time of the Durga Pujah, or for the reading of the Mahabharat and Pooran, or for the prayer of God during certain months are valid (*f*).

Superstitious uses not forbidden.—The English law relating to superstitious uses does not apply to Hindu religious endowments. Thus a gift in favour of an idol, or for the performance of the worship of a deity is valid according to the Hindu law, though it may not be valid according to the English law (*g*). Dispositions for religious purposes are highly favoured by Hindu law, and the leaning of the Courts also is in the same direction. Dedication of property by a Hindu to a deity is not only lawful, but commendable in a high degree from the Hindu point of view (*h*).

405. Gift to dharam void.—A gift or bequest to *dharam* is void for vagueness and uncertainty; so also a bequest for good work (*i*). The objects meant by that word are too vague and uncertain for the administration of them to be under the control of a Court (*j*). Where the bequest is for dharam, dharamashala and Sanskrit education, the bequest for dharam being void, the whole is void (*k*).

It is a maxim of equity, that the execution of a trust shall be under the contro of the Court. The trust therefore must be of such a nature that it can be under that control. For that purpose it is necessary that the subject and object of the trust must both be such as can be ascertained by the Court. If the subject or object cannot be ascertained, the trust cannot be enforced by the Court, and it is void (*l*). In the case

(*z*) *Bhupati Nath* v. *Ram Lal* (1910) 37 Cal. 128, 3 I.C. 642; *Khusalchand* v. *Mahadevgiri* (1875) 12 Bom. H.C. 214.

(*a*) *Dwarkanath* v. *Burroda* (1879) 4 Cal. 443; *Rajendra Lall* v. *Raj Koomari* (1907) 34 Cal. 5; *Manorama* v. *Kalicharam* (1904) 31 Cal. 166.

(*b*) *Prafulla* v. *Jogendranath* (1905) 9 C.W.N. 528; *Lakshmishankar* v. *Vaijnath* (1882) 6 Bom. 24.

(*c*) *Manorama* v. *Kalicharan* (1904) 31 Cal. 166.

(*d*) *Funindra* v. *Adm.-Gen. of Bengal* (1901) 6 C.W.N. 321.

(*e*) *Chaturbhuj Singh* v. *Sarada Charan Guha* (1932) 11. Pat. 704, 141 I.C. 157, ('33) A.P. 6.

(*f*) (1879) 4 Cal. 443, *supra*. But see *In re Darling* (1896) 1 Ch. 50.

(*g*) *Juggut Mohini* v. *Sokheermoney* (1871) 14 M.I.A. 289, 301-302; *Kushalchand* v. *Mahadevgiri*, *supra*.

(*h*) (1910) 37 Cal. 128, 136-137, 141, 3 I.C. 642, *supra*.

(*i*) *Gauri Shunkar & Ors.* v. *Mohanlal* (1940) 15 Luck. 674, 187 I.C. 597, ('40) 275.

(*j*) *Runchordas* v. *Parvatibai* (1899) 23 Bom. 725, 26 I.A. 71 affirming (1897) 21 Bom. 646.

(*k*) *Narain Das* v. *Brij Lal* (1933) 14 Lah. 827, 146 I.C. 1013, ('33) A.L. 838.

(*l*) *Morice* v. *The Bishop of Durham* (1804) 10 Ves. 522 [objects of benevolence or liberality]; *In re Riland* (1881) W.N. [Eng.] 173 [charitable or benevolent purposes]; *In re Macduff* (1896) 2 Ch. 451 [purposes, charitable or philanthropic]; *Blair* v. *Duncan* [1902] A.C. 37 [such charitable or public purposes as my trustee thinks proper]; *Hunter* v. *Att.-Gen.* [1899] A.C. 309; *Grimond* v. *Grimond* [1905] A.C. 124. As to what are charitable objects, see the judgment of Lord Macnaghten in *The Commissioners of Income Tax* v. *Pemsel* [1891] A.C. 531, at p. 583.

of a gift to *dharam* the Judicial Committee observed in *Runchordas* v. *Parvatibai* (*m*), that the objects which can be considered to be meant by that word are vague and uncertain. In Wilson's Dictionary the word *dharam* is defined to be law, virtue, legal or moral duty. Relying upon this definition of *dharam*, the Judicial Committee held that the word *dharam* was as vague as the words "purposes charitable or philanthropic" which, on account of their vagueness, render a trust for those purposes void in the English law (*n*). Gifts for "charitable or other purposes" or gifts expressed in other alternative terms are not charitable; for they may be executed without any part of the property being applied to charitable purposes (*o*). Thus a gift for "charitable or benevolent purposes" is void (*p*). Applying the above principles it has been held that a trust for *sarakam* [good work] (*q*), a trust for "purposes of popular usefulness *or* for purposes of charity as may be approved by the trustees" (*r*), a trust for spending money "in proper and just acts for the testator's benefit" (*s*), and a trust for disposing of the residue "in a righteous manner, in a pious and charitable way, as may appear advisable to all my three executors, and in such manner that people may speak well of me and that all my three heirs may acquire great fame" (*t*), are all void. Similarly in ultimate residuary gift to any agnate, and failing agnates to any Brahmin who would live in the testator's ancestral house, has been held to be void (*u*). A direction to trustees to pay a certain sum of money at their discretion towards dispensaries, hospitals, charitable societies, schools or any students' association, feeding of the poor, etc., marriage upanayan, etc., excavation and consecration of tanks, etc., or in the construction of ghats or maths, has also been held to be void (*v*) But a gift to *sadavarat* to be established at a definite place is valid (*w*). A gift to "such *charities* as the trustees may think deserving," is also valid (*x*); and so also a gift with power to trustees to give away the property "*in charity* in such manner and to such religious *and* charitable purposes as they may in their discretion think proper" (*y*). S. 405

A gift "for the performance of ceremonies and giving feasts to Brahmans" is not void for uncertainty (*z*). Nor is a devise of property to executors upon trust to distribute the same among the testator's poor relations, dependants and servants (*a*).

A gift for spreading of Hindu religion is void (*b*). There is a conflict of opinion whether a gift for the spread of the Sanskrit language is void for uncertainty (*c*).

When there is a bequest for feeding the poor—a bequest which is valid in law—the fact that it is referred to in a later part of the same will as "dharam" does not make it invalid (*d*).

(*m*) (1899) 23 Bom. 725, 26 I.A. 71.
(*n*) *Runchordas* v. *Parvatibai* (1899) 23 Bom. 725, 26 I.A. 71; *Parthasarathy* v *Thiruvengada*(1907) 30 Mad. 340[*Dharam*]. *Gangabai* v. *Thavar* (1863) 1 Bom. H.C. 71 [*Dharam*]; *Advocate-General* v. *Damodhar* (1852) Perry's Oriental cases 526 [*Dharam*]; *Cursandas* v. *Vundravandas* (1890) 14 Bom. 482 [*Dharmada*]; *Devshankar* v. *Motiram* [1894] 18 Bom. 136 [*Dharmada*]. See also *Venkatanarasimha* v. *Subba Rao* (1923) 46 Mad. 300, 73 I.C. 991, ('23) A.M. 376.
(*o*) Halsbury, Vol. IV, p. 146, art. 230.
(*p*) (1881) W. N. [Eng.] 173, *supra*. See also *Re Harbinson* (1902) I. R. 103; *Re Sidney* (1908) 1 Ch. 488.
(*q*) *Bai Bapi* v. *Jamnadas* (1898) 22 Bom. 774.
(*r*) *Trikumdas* v. *Haridas* (1907) 31 Bom. 583; *Jamnabai* v. *Dharsey* (1902) 4 Bom. L.R. 893.
(*s*) *Gokool Nath* v. *Issur* (1887) 14 Cal. 222.
(*t*) *Nanalal* v. *Harlochund* (1890) 14 Bom. 476, 479.
(*u*) *Shayama Charan* v. *Sorup Chundra* (1912) 17 C.W.N. 39, 14 I.C. 708.
(*v*) *Sarat Chandra* v. *Pratub Chandra* (1913) 40 Cal. 232, 21 I.C. 194.
(*w*) *Morarji* v. *Nenbai* (1893) 17 Bom. 351.
(*x*) *Smith* v. *Massey* (1906) 30 Bom. 500; *Gordhandas* v. *Chunnilal* (1908) 30 All. 111; *Surbomungola* v. *Mohendronath* (1879) 4 Cal. 508.
(*y*) *Parvati* v. *Ram Barun* (1904) 31 Cal. 895.
(*z*) *Lakshmishanker* v. *Vajnath* (1882) 6 Bom. 24.
(*a*) *Manorama* v. *Kali Charan* (1903) 31 Cal. 166.
(*b*) (1923) 46 Mad. 300, 73 I.C. 991, ('23) A.M. 376, *supra*.
(*c*) (1923) 46 Mad. 300, 314-315, 73 I.C. 991, ('23) A.M. 376 [Spencer, J.], 325-345 [Devadoss, J.], *supra*.
(*d*) *Vaidyanatha* v. *Swaminatha* (1924) 47 Mad. 884, 51 I.A. 282, 82 I.C. 804, ('24) A.PC. 221.

Ss. 406, 407

406. Subject of endowment.—A Hindu may dedicate for religious and charitable objects all property which he can validly dispose of by gift or by will [s. 357 and s. 368].

There is nothing to prevent a Hindu from dedicating the whole of his property for religious and charitable purposes (*e*).

407. Endowment how created.—(*1*) No writing is necessary to create an endowment (*f*), except where the endowment is created by a will, in which case the will must be in writing and attested by at least two witnesses, if the case is governed by the Indian Succession Act, 1925, s. 57 [s. 369 above]. An entry in the account of a firm of money-lenders showing that the firm is indebted to the temple followed by crediting of interest does not create an endowment (*g*).

(*2*) A Hindu, who wishes to establish a religious or charitable institution, may, according to his law, express his purpose and endow it. A trust is not required for that purpose. All that is necessary is that the religious or charitable purposes should be clearly specified, and that the property intended for the endowment should be set apart for or dedicated to those purposes. Even in the case of a dedication to an idol, which cannot itself physically hold lands, it is not necessary, though it is usual, to vest the lands in trustees. Nor is it necessary that there should be any express words of gift to the idol (*h*). No religious ceremony such as *sankalp* or *samarpan* is necessary and a clear and unequivocal manifestation of intention to create a trust and vesting of the same in the donor or another as a trustee is enough to constitute dedication (*i*).

The Indian Trusts Act, 1882, *s.* 1.—The Indian Trusts Act, 1882, does not apply to public or private religious or charitable endowments (*j*).

The Transfer of Property Act, 1882, *s.* 123.—It has been held by the High Court of Madras that a dedication of land for a public temple is not a gift within the meaning of sec. 122 of the Transfer of Property Act, 1882. The provisions, therefore, of sec. 123 of the Act, which require a gift of land to be effected by a registered instrument, do not apply to such a dedication (*k*).

(*e*) See Sir F. MacNaghten's Considerations on Hindu Law, p. 335.

(*f*) *Muddun Lal* v. *Komul Bibee* (1867) 8 W. R. 42; *Ramalinga* v. *Sivachidambara* (1919) 42 Mad. 440, 49 I.C. 742, ('19) A.M. 809; *Pallayya* v. *Ramanadhanulu* (1903) 13 Mad. L. J. 364; *Gangi Reddi* v. *Tammi Reddi* (1927) 54 I.A. 130, 50 Mad. 421, 101 I.C. 79, ('27) A.PC. 80, on appeal from (1922) 45 Mad. 281, 70 I.C. 337, ('22) A.M. 236.

(*g*) *Sooniram Ramniranjandass* v. *Alagu Nachiyar Koil* (1939) Rang. 59.

(*h*) *Manohar* v. *Lakhmiram* (1888) 12 Bom. 247, 263; *Bhuggobutty* v. *Gooroo* (1898) 25 Cal. 112, 127; *Prafulla* v. *Jogendranath* (1905) 9 C. W. N. 528, 534; *Venkatanarsimha* v. *Subba Rao* (1923) 46 Mad. 300, 73 I.C. 991, ('23) A.M. 376.

(*i*) *Prem Nath* v. *Hari Ram* (1935) 16 Lah. 85, 154 I.C. 229, ('34) A.L. 771; *Jai Dayal* v. *Ramsaran Das* (1938) Lah. 704.

(*j*) *Gopu* v. *Sami* (1905) 28 Mad. 517; *Narasimha* v. *Venkatalingum* (1927) 50 Mad. 687, 103 I.C. 302, ('27) A.M. 636 [F.B.].

(*k*) *Pallayya* v. *Ramanadhanulu* (1903) 13 Mad. L.J. 364; *Narasimha* v. *Venkatalingum* (1927) 50 Mad. 687, 103 I.C. 302, ('27) A.M. 636 [F.B.], *supra*.

Revocation of endowment.—A valid endowment once created cannot be revoked by the donor (*l*). **Ss. 407-408**

407A. Illusory endowments.—(*1*) The mere execution of a deed, though it may purport on the face of it to dedicate property to an idol, is not enough to constitute a valid endowment; for the real object of the executant may be to defraud creditors, or to defeat the provisions of the ordinary law of descent, or to restrain alienations and keep the property in perpetuity in the family. It is necessary for the validity of a deed of endowment that the executant should *divest himself of the property*. Whether he has done so or not, is to be determined by his subsequent acts and conduct. Thus, if the profits of the property are appropriated by the executant to his own use, and not to the worship of the idol, and his subsequent dealings with the property show that he *did not intend to create an endowment,* the dedication will be inoperative, and the property cannot be treated as debutter, *i.e.*, belonging to the idol. The property will still continue to be his, and it may be attached in execution of a decree against him (*m*). Similarly, if a Hindu purchases property in the name of his idol, without setting up the idol for public worship and without appointing priests for its worship, the property does not become the property of the idol, but remains his own private property (*n*).

(*2*) Where there is no real dedication of property for the worship of an idol, but only an attempt to create a perpetuity in favour of the settlor's descendants, the gift to the idol is void (*o*). The mere fact, however, that the members of the settlor's family are nominated as Shebaits or mutawallis of the temple and that they are to be remunerated out of the income of the property is no ground for holding that the dedication is not real, provided the remuneration is reasonable having regard to the income of the property (*p*).

408. Complete dedication—absolute grant in favour of charity.—A dedication of property to religious or charitable

(*l*) *Dasami* v. *Param* (1929) 51 All. 621, 116 I.C. 433, ('29) A.A. 315

(*m*) *Watson and Co.* v. *Ramchund* (1891) 18 Cal. 10; *Konwar Dooryanath* v. *Ramchunder* (1877) 2 Cal. 341, 349, 4 I.A. 52; *Suppamal* v. *Collector of Tanjore* (1889) 12 Mad. 387; *Ram Dhan* v. *Prayag* (1921) 43 All. 503, 62 I.C. 862, ('21) A.A. 37; *Siri Thakur* v. *Atkins* (1919) 4 Pat. L.J. 533, 53 I.C. 106, ('19) A.P. 442; *Bhekdhari Singh* v. *Sri Ramchanderji* (1931) 10 Pat. 388, 136 I.C. 290, ('31) A.P. 275.

(*n*) *Brojosoondery* v. *Lychmee* (1873) 20 W.R. 95 (P.C).

(*o*) *Promotho* v. *Radhika* (1875) 14 Beng. L R. 175; *Sri Thakurji* v. *Sukhdeo Singh* (1920) 42 All. 395, 58 I.C. 583, ('20) A A 63 [F.B.]

(*p*) *Jadu Nath Singh* v. *Thakore Sita Ramji* (1917) 44 I.A. 187, 39 All. 553, 42 I.C. 225, ('17) A.PC. 177; *Chandi Charan* v. *Dulal Chandra* (1927) 54 Cal. 30, 98 I.C. 684, ('26) A.C. 1083; *Ishwari Bhuvaneshwari Thakurani* v. *Projonath Dey* (1937) 64 I.A. 203, (1937) 2 Cal. 447, 39 Bom. L.R. 933, 168 I.C. 765, ('37) A.PC. 185.

Ss. 408, 408A

uses may be complete, or it may be partial. The question whether it is complete or partial depends on the construction of the instrument of grant as a whole (*q*).

When there was no formal dedication of a bathing ghat and the plaintiff (or his predecessors) acted as owners and not as Shebaits in effecting repairs and levying tolls it was held that the plaintiff is the owner and that there was no dedication (*r*).

Where the whole property is dedicated absolutely to the worship of an idol, and no beneficial interest in it is given to any person, the dedication is said to be absolute and complete. In such a case the property is held by the idol—though it is only in an ideal sense that property is so held—and it cannot be alienated except in the cases mentioned in section 415 (*s*).

408A. Partial dedication—charge in favour of charity.— Where by the grant a mere charge or trust is created in favour of an idol, the dedication is said to be partial or qualified. In such a case the property descends, and is alienable and partible, in the ordinary way; but subject always to the trust or charge in favour of the idol (*t*). Where the surplus income, after the expenses of worship and ceremony were met, was to be invested in houses, for the residence of the settlor's descendants, it was held that there was no complete dedication (*u*).

In determining whether the will of a Hindu gives the estate to an idol subject to a charge in favour of the heir of the testator, or makes the gift to the idol a charge upon the estate, there is no fixed rule depending on the use of particular terms in the will; the question depends on the construction of the will as a whole. Thus although a will provides that the property of the testator "shall be considered to be the property of" a certain idol, the further provisions such as that the residue after defraying the expenses

(*q*) *Pande Har Narain* v. *Surja Kunwari* (1921) 48 I.A. 143, 43 All. 291, 63 I.C. 34, ('21) A.PC. 20; *Bhekdhari Singh* v. *Sri Ramchanderji* (1931) 10 Pat. 388, 136 I.C. 290, ('31) A.P. 275.

(*r*) *Maharani Hemantha Kumari* v. *Gauri Shankar Tewari* (1941) All. 401, 193 I.C. 882, 68 I.A. 53, ('41) A.PC. 38.

(*s*) *Jagadindra Nath* v. *Hemanta* (1905) 32 Cal. 129, 31 I.A. 203; *Jadu Nath Singh* v. *Thakur Sita Ramji* (1917) 44 I.A. 187, 39 All. 533, 42 I.C. 225, ('17) A.PC. 177; *Shri Ganesh* v. *Keshavrao* (1891) 15 Bom. 625; *Rajendra* v. *Sham Chund* (1881) 6 Cal. 106; *Bhuggobutty* v. *Gooroo* (1898) 25 Cal. 112; *Sathianama* v. *Saravanabagt* (1895) 18 Mad. 266; *Chandi Charan* v. *Dulal Chandra* (1927) 54 Cal. 30, 98 I.C. 684, ('26) A.C. 1083.

(*t*) (1905) 32 Cal. 129, 31 I. A. 203, *supra*; *Sonatun* v. *Juggutsoondree* (1859) 8 M.I.A. 66; *Ram Coomar* v. *Jogender Nath* (1879) 4 Cal. 56; *Ashutosh* v. *Doorga Churn* (1880) 5 Cal. 438, 6 I. A. 182; *Kulada Prasad* v. *Kali Das* (1915) 42 Cal. 536, 30 I.C. 899, ('14) A.C. 813; *Mahim Chandra* v. *Hara Kumari* (1915) 42 Cal. 561, 30 I.C. 798, ('15) A.C. 487; *Gopal Lal Sett* v. *Purna Chandra Basak* (1922) 49 I.A. 100, 49 Cal. 459, 67 I.C. 561, ('22) A.PC. 253, (1921) 48 I.A. 143, 43 All. 291, 63 I.C. 34, ('21) A.PC. 20, *supra*; (1931) 10 Pat. 388, 136 I. C. 290, ('31) A. P. 275, *supra*; *Parshadi Lal* v. *Brijmohanlal* (1936) 11 Luck. 575, 159 I. C. 117, ('36) A.O. 52.

(*u*) *Surendra Krishna Ray* v. *Shree Shree Ishwar Bhubaneshwari Thakurani* (1933) 60 Cal. 54, 144 I.C. 792, ('33) A.C. 295; *Ishwari Bhuvaneshwari Thakurani* v. *Brojonatha Dey* 64 I.A. 203, (1937) 2 Cal. 447, 39 Bom. L.R. 933, 168 I.C. 765, ('37) A.PC. 185.

of the temples "shall be used by our legal heirs to meet their own expenses," and the circumstances such as that in respect of the ceremonies to be performed the expenditure was fixed by the will and would absorb only a small proportion of the total income, may indicate that the intention was that the heirs should take the property subject to a charge for the performance of the religious purposes named (*v*).

409. Application of profits of property—evidence of dedication.—(*1*) Where there is no instrument of grant, the mere fact that the profits of any land are being used for the support of an idol is not proof that that land formed an endowment for the purpose; but where there is apparently good evidence going back for a long period, *e.g.*, for more than half a century, that the land was given for the support of an idol, proof that from that time the profits had been so expended would be strong corroboration (*w*).

The fact that the deceased karta of a joint Hindu family regularly paid the expenses of a charitable institution out of the profits of a family property, those expenses however not exhausting the whole of those profits, does not establish a dedication of the property to the charity (*x*).

In the case last cited the Judicial Committee while reversing the decree passed by both the Subordinate Judge and the High Court, observed that the Subordinate Judge had failed to notice the distinction between meeting of the expenses of a charity out of a particular property, and applying all the receipts of that property to the charity.

(*2*) Though the mere fact of the profits of any land being used for the support of an idol may not be proof that the land formed an endowment for the purpose, yet it is a fact that might well be taken into consideration in cases where the intention of the founder is to be gathered from an ancient document expressed in ambiguous language (*y*). In the construction, again, of such a document evidence is admissible as to the manner in which the property has been possessed and used (*z*).

410. Bequest to idol not in existence at testator's death.—The principle of Hindu law which invalidates a bequest other than to a person in existence at the death of the testator [s. 372], does not apply to a bequest to trustees for the establishment of the image of a deity after the death of the testator.

(*v*) *Pande Har Narain* v. *Surja Kunwari* (1921) 48 I.A. 143, 43 All. 291, 63 I.C. 34; *Parshadi Lal* v. *Brijmohanlal* (1936) 11 Luck. 575, 159 I.C. 117, ('36) A.O. 52.

(*w*) *Muddun Lal* v. *Sreemutty Komul Bibee* (1867) 8 W. R. 42, 44; *Konwar Doorganath* v. *Ram Chunder* (1877) 2 Cal. 341, 349, 4 I. A. 52.

(*x*) *Gangi Reddi* v. *Tammi Reddi* (1927) 54 I.A. 136, 50 Mad. 421, 101 I.C. 79, ('27) A. PC. 80, reversing on this point same case in (1922) 45 Mad. 281, 70 I.C. 337, ('22) A.M. 236.

(*y*) *Abhiram* v. *Shyama Charan* (1909) 36 Cal. 1003, 1012, 36 I.A. 148, 4 I.C. 449.

(*z*) *Kulada Prosad* v. *Kali Das* (1915) 42 Cal. 536, 543-544, 24 I.C. 899, ('14) A.C. 813.

Ss. 410-411A

Such a gift is valid, though the image is to be established and consecrated *after* the testator's death (*a*). Similarly a dedication of immoveable property by means of an Arpannama to a number of deities some of which were installed at the date of the disposition are valid (*b*).

Illustration.

A bequeaths his property to his executors upon trust to establish *after* his death an image of the goddess Kali in the name of his mother, and to devote the income of the balance to the worship of the goddess. The bequest is valid, though the image is to be installed for the first time after the testator's death. See secs. 359 to 362, and secs. 375 to 378.

The idol must be specified.—The dedication must be to a *particular* deity. A dedication to "the Thakurji in my Thakurdwara" without mentioning the particular Thakurji to whom the bequest is to be given, is void for uncertainty (*c*).

Mutilation of idol.—The destruction or mutilation of the image does not affect the endowment. A new image may be established, and the endowment kept up (*d*). The actual installation of an idol in a temple or the construction of a temple for that purpose is not absolutely necessary for validating a settlement in favour of the idol (*e*).

411. Endowments and rule against perpetuities.—(*1*) A dedication of property for a public, religious or charitable purpose is not invalid because it transgresses the rule which forbids the creation of perpetuities. The rule against perpetuity applies to gifts and bequests in favour of private individuals [s. 385]. It does not apply to religious and charitable endowments (*f*).

(*2*) Where the estate created by a grant is in its nature secular, the mere fact that the motive for the grant was religious does not constitute it a religious endowment, so as to exempt it from the rule against perpetuities (*g*).

A, actuated by religious motives, makes a gift of certain property to *B* and *C*, both Brahmins, subject to the condition that they *should not alienate* the property and that it should be enjoyed by them and their heirs *for ever*. The restraint against alienation is void; and *B* and *C* take the property absolutely.

411A. Endowments and directions for accumulations.—The rule stated in sec. 397 as to directions for accumulations does not apply to religious endowments.

See Transfer of Property Act, 1882, s. 18.

(*a*) *Bhupati Nath* v. *Ram Lal* (1910) 37 Cal. 128, 3 I.C. 642; *Mohar Singh* v. *Het Singh* (1910) 32 All. 337, 5 I.C. 584; *Chatarbhuj* v. *Chatarjit* (1911) 33 All. 253, 8 I.C. 832.

(*b*) *Bhupathinath Chakrabarti* v. *Basantkumari Debi* (1936) 63 Cal. 1098, ('36) A.C. 556.

(*c*) *Phundan Lal* v. *Arya Prithi* (1911) 33 All. 793, 11 I.C. 260; *Chandi Charan* v. *Haribola* (1919) 46 Cal. 951, 51 I.C. 275, ('19) A.C. 109.

(*d*) *Bijoychand* v. *Kalipada* (1914) 41 Cal. 57, 20 I.C. 78, ('14) A.C. 200.

(*e*) *Sarab Sukh* v. *Ram Prasad* (1924) 46 All. 130, 135, 78 I.C. 1018, ('24) A.A. 357.

(*f*) Transfer of Property Act, 1882, s. 18; Indian Succession Act, 1925, s. 118; *Bhuggobutty* v. *Gooroo* (1898) 25 Cal. 112; *Prafulla* v. *Jogendra Nath* (1905) 9 C.W.N. 528.

(*g*) *Anantha* v. *Nagamuthu* (1882) 4 Mad. 200.

412. Estate in remainder.—An endowment is not invalid because it is to take effect after the determination of an estate for life (*h*). Ss. 412, 413

Illustration.

A executes a deed by which he reserves to himself a life-estate in certain property and directs that after his death the income of the property shall be paid to his daughter for life and after her death it shall be devoted to a certain temple. The endowment is valid, though it is to take effect after the determination of the life-estates in favour of the settlor and his daughter.

413. Devasthanam, Math, Shebait, Mohunt, Debutter property.—Where property is devoted *absolutely* to religious purposes, in other words, where the dedication is absolute and complete, the possession and management of the property belongs, in the case of a *devasthanam* or temple, to the manager of the temple, called *shebait*; and, in the case of a *math*, that is an abode for students of religion, to the head of the *math*, called *mohunt*; and this carries with it the right to bring whatever suits are necessary for the protection of the property. Every such right of suit is vested in the case of temple property in the *shebait*, and not in the idol, and in the case of *math* property in the *mohunt* (*i*). Property dedicated to religious uses is called *debutter* property. "Debutter" means literally 'belonging to a deity.'

Succeeding shebaits of a temple and mohunts of a math form a continuous representation of the property of the idol or of the math (*j*).

Distinction between temples and maths.—The religious foundations known as *Devasthanams* or temples are the most numerous in India, and have the largest endowments especially in the shape of lands, assignment of public revenue, and jewellery. These institutions have been established for the spiritual benefit of the Hindu community in general, or for that of particular sects or sections thereof. Next to the temples, the most important religious foundations in this country are the ancient *maths* or monasteries presided over almost invariably by *sanyasis* or monks. The object of these *maths* (or *mutts*) is generally the promotion of religious knowledge, and the imparting of spiritual instruction to the disciples and followers of the *math*. In the case of *maths* though there are idols connected therewith, the worship of them is a secondary matter. The two classes of institutions, namely, temples and *maths*, are thus supplementary to each other in the Hindu Ecclesiastical system, both conducive to spiritual welfare, the one by affording opportunities for prayer and worship, the other by facilitating spiritual instruction and the acquisition of religious knowledge. In the case of temples, the ideal person is the *idol* itself: in the case of *maths* the ideal person is the office of the spiritual

(*h*) *Gobind* v. *Gomti* (1908) 30 All. 288.

(*i*) *Jagadindra Nath* v. *Hemanta* (1905) 32 Cal. 129, 31 I.A. 203; *Babajirao* v. *Laxmandas* (1904) 28 Bom. 215; *Bidhu* v. *Kuladaprasad* (1919) 46 Cal. 877, 50 I.C. 525, ('19) A.C. 245; *Jodhi Rai* v. *Basdeo Prasad* (1911) 33 All. 735, 11 I. C. 47 [F.B.]; *Gobinda Ramanuj Das Mohanta* v. *Mohanta Ramcharan Ramanuj Das* (1936) 63 Cal. 326.

(*j*) *Gulabbhai* v. *Sohangdasji* (1928) 52 Bom. 431, 110 I.C. 263, ('28) A.B. 183.

Ss. 413, 414

teacher, *Acharya*, which, as it were, is *incarnate* in the person of each successive *Swami* or head of the *math*. This difference in the character of the juridical person in the case of temples and in the case of *maths* leads to this result, that while the *shebait* of a temple forfeits his position as such by reason of his lunacy, the head of a *math* does not (*k*). A shebait need not be removed from the office on account of his subsequent lunacy. The guardian of the lunatic can discharge his duties on his behalf (*l*).

Property held by an idol.—" It is only in an ideal sense that property can be said to belong to an idol; and the possession and management of it must in the nature of things be entrusted to some person as *shebait*, or manager " (*m*).

Property held by a math.—" A *math*, like an idol, is in Hindu law a juridical person capable of acquiring, holding and vindicating legal rights, though of necessity it can only act in relation to those rights through the medium of some human agency. When the property is vested in the *math*, then litigation in respect of it has ordinarily to be conducted by, and in the name, of the manager [*Mohunt*] " (*n*).

Idols and maths are both juridical persons.—The Hindu law, like the Roman law and those [systems of law] derived from it, recognizes not only corporate bodies with rights of property vested in the corporation, apart from its individual members, but also the juridical persons or subjects called foundations (*o*). Temples and *maths* are both religious foundations.

Though there are some points of similarity between a minor and a Hindu idol still the idol is not a perpetual minor (*p*). Any next friend may sue on behalf of an idol for a declaration that certain property is debutter property. It is not necessary to ask the shebait to institute the suit before the next friend files it (*q*).

Suit in name of temple.—A temple is not a juridical person; no suit, therefore, relating to the temple property, can be instituted in the name of the temple (*r*).

Female manager.—There is nothing to prevent a female from being the manager of a religious endowment, but she cannot perform any spiritual functions (*s*). According to the practice and precedents obtaining in the Madras Presidency a Hindu female is not incompetent by reason of her sex to succeed to the office of Acharya in a temple and to the emoluments attached thereto (*t*).

Trustees.—Property belonging to a religious institution may by the usage and custom of the institution vest in trustees other than the spiritual head (*u*).

414. Position of shebait and mohunt.—(*1*) *Shebait.* A shebait is, by virtue of his office, the administrator of the property attached to the temple of which he is the shebait. As regards

(*k*) *Vidyapurna* v. *Vidyanidhi* (1904) 27 Mad. 435; *Sammantha* v. *Selappa* (1879) 2 Mad. 175, 179; *Giyana* v. *Kandasami* (1887) 10 Mad. 375, 389.

(*l*) *Nirmal Kumar Banerji* v. *Jyoti Prasad Banerji* (1941) 2 Cal. 128, 197 I.C. 763, ('42) A.C. 99.

(*m*) *Prosunno Kumari* v. *Golab Chand* (1875) 14 Beng. L.R. 450, 459, 2 I.A. 145, 152; *Pramatha Nath* v. *Pradyumna* (1925) 52 I. A. 245, 251-252, 52 Cal. 809, 816, 87 I.C. 305, ('25) A.PC. 139.

(*n*) *Babajirao* v. *Laxmandas* (1904) 28 Bom. 215, 223.

(*o*) *Manohar* v. *Lakhmiram* (1888) Bom. 247, 263, affd. in *Chotalal* v. *Manohar* (1900) 24 Bom. 50, 26 I. A. 199; *Narasimha* v. *Venkatalingum* (1927) 50 Mad. 687, 103 I. C. 302, ('27) A. M. 636; *In re Sarjubai* (1944) Nag. 81 [F.B.].

(*p*) *Turit Bhusan Ray* v. *Sree Ishwar Sridhar Salgrameila Thakur* (1941) Cal. 477, 199 I.C. 486, ('42) A.C. 99.

(*q*) *Thakur Sree Sree Annapurna Debi* v. *Shiba Sundari Dasi* (1944) 2 Cal. 144.

(*r*) *Thakardwara Phru Mal* v. *Ishar Das* (1928) 9 Lah. 588, 110 I. C. 384, ('28) A.L. 375.

(*s*) See *Janoki Devi* v. *Gopal* (1882) 9 Cal. 766, 10 I.A. 32; *Keshavbhat* v. *Bhagirathibai* (1866) 3 Bom. H.C.A.C. 75.

(*t*) *Annaya* v. *Ammakka* (1918) 41 Mad 886, 47 I.C. 341, ('19) A M. 598 [F.B.].

(*u*) *Arunachellam* v. *Venkatachalapathi* (1919) 46 I.A. 204, 43 Mad. 253, 53 I.C. 288, ('19) A.PC. 62.

the *property* of the temple, he is in the position of a trustee. But as regards the *service of the temple* and the duties that appertain to it, he is rather in the position of the holder of an office or dignity (*v*). S. 414

It has been laid down by the Judicial Committee, that a shebait has not the legal ownership in, but only the title of manager of, a religious endowment (*w*). It follows from this that the rent of property dedicated to the services of an idol (*x*), as well as offerings made to the idol [s. 422], belong to the idol, and not to the shebait. A shebait, being a manager only, ceases to be a shebait when he ceases to manage the property and carry on the worship of the idol (*x*). Where the founder has reserved to himself the puja of the idol he is the shebait, but if he chooses not to administer the endowed property and appoints another to perform the duty the former is competent to dismiss the latter (*y*).

(2) *Mohunt.*—As to the property of a math, the title to it in an ordinary case is in the mohunt as spiritual head of the institution, but the property may by the usage and custom of the institution vest in trustees other than the spiritual head. In any case the property is held solely in trust for the purposes of the institution (*z*); surplus income must be added to the endowment and not applied for the personal enjoyment of the head of the math (*a*). A mohunt is not a trustee in the English legal sense of the term (*b*). His functions and duties are regulated by custom. His very wide discretion as to the application of the income is subject to the fiduciary obligation to manage the property so as to serve effectively the objects for which the Math exists (*c*). The *de facto* mohunt of a Math though not duly installed can maintain a suit to recover the property for its benefit from trespassers (*d*).

Dharmakarta.—A dharmakarta is no more than a manager, and his rights, apart perhaps from the question of personal support, are never higher than those of a mere trustee; in this respect he differs from a shebait or the head of a math. Those functionaries have a much higher right with larger powers of disposal and administration (*e*).

Benami purchase by shebait of debutter property.—As a shebait occupies a fiduciary position with respect to debutter property, a purchase of such property by him benami

(*v*) *Ramanathan* v. *Murugappa* (1906) 29 Mad. 283, 33 I.A. 139.
(*w*) *Shibessouree* v. *Mothooranath* (1869) 13 M.I. A. 270, 273.
(*x*) *Bhuban Mohun* v. *Narendra Nath* (1931) 35 C.W.N. 478, 135 I.C. 865, ('32) A.C. 27.
(*y*) *Ram Das* v. *Shri Ram Laxman Janki* (1943) All. 845, 209 I.C. 463, ('43) A.A. 352.
(*z*) *Gobinda Ramanuj Das Mohanta* v. *Mohanta Ramcharan Ramanuj Das* (1936) 63 Cal. 326.
(*a*) *Arunachellam* v. *Venkatachalapathi* (1919) 46 I.A. 204, 43 Mad. 253, 53 I.C. 288, ('19) A.PC. 62; *Ram Parkash Das* v. *Anand Das* (1916) 43 I.A. 73, 43 Cal. 707, 33 I.C. 583, ('16) A.PC. 256; *Sethuramaswamiar* v. *Meruswamiar* (1918) 45 I.A. 1, 41 Mad. 296, 43 I.C. 806, ('17) A.PC. 1900, *Balaswamy* v. *Venkataswamy* (1917) 4 Mad. 745, 40 I.C. 531, ('18) A.M. 984.
(*b*) *Anantakrishna Shastri* v. *Prayagdas* (1937) 1 Cal. 84.
(*c*) *Mahant Kesho Das* v. *Amar Dasji* (1935) 14 Pat. 379, 156 I.C. 1099, ('35) A.P. 111.
(*d*) *Mahadeo Prasad Singh* v. *Karia Bharti* (1935) 57 All. 39, 62 I.A. 47, 153 I.C. 1100, ('35) A.PC. 44; *Sr. Radhakrishna Asthapit Thakurdwara* v. *Mst. Maharaj Kunwar* (1937) 12 Luck. 331, 164 I.C. 919, ('37) A.O. 69.
(*e*) *Srinivasa Chariar* v. *Evalappa Mudaliar* (1922) 49 I.A. 237, 45 Mad. 565, 68 I.C. 1, ('22) A.PC. 325.

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and without disclosing that he is the real purchaser is invalid, even if he buys at a sale execution proceedings and has paid the full market value (*f*).

415. Alienation of debutter property.—(*1*) As a general rule of Hindu law, property given for the maintenance of religious worship, and of charities connected with it, is inalienable. It is competent, however, for the shebait or mohunt in charge of the property, in his capacity of shebait or mohunt and as manager of the property, to incur debts and borrow money on a mortgage of the property for the purpose of keeping up the religious worship, and for the benefit and preservation of the property. The power, however, incur debts must be measured by an existing necessity for incurring them.

(*2*) The power of a shebait or a mohunt to alienate debutter property is analogous to that of a manager for an infant heir as defined by the Judicial Committee in *Huneoman Persaud* v. *Mussumat Babooee* (1856) 6 M.I.A. 393. As held in that case, he has no power to alienate debutter property except " in a case of need or for the benefit of the estate." He is not entitled to sell the property for the purpose of investing the price of it so as to bring in an income larger than that derived from the property itself. Nor can he, except for legal necessity, grant a permanent lease of debutter property, though he may create proper derivative tenures and estates conformable to usage (*g*). Where, however, a grant of a permanent lease has been affirmed by a judgment of the Court, the judgment will operate as res judicata, and the succeeding shebait or mohunt will be bound by it (*h*).

Powers of shebait and mohunt.—" It is only in an ideal sense that property can be said to belong to an idol; and the possession and management of it must in the nature of things be entrusted to some person as shebait, or manager. It would seem to follow that the person so entrusted must of necessity be empowered to do whatever may be required for the service of the idol, and for the benefit and preservation of its property, at least to as great a degree as the manager of an infant heir. If this were not so, the estate of the idol might be destroyed or wasted, and its worship discontinued, for want of the necessary funds to preserve and maintain them " (*i*).

(*f*) *Peary Mohan* v. *Monohar* (1921) 48 I.A. 258, 48 Cal. 1019, 62 I.C. 76, ('22) A.PC. 235.

(*g*) *Prosunno Kumari* v. *Golab Chand* (1875) 2 I.A. 145, 14 Beng. L.R. 450 [Mortgage], *Abhiram* v. *Shyama Charan* (1909) 36 Cal. 1003, 36 I.A. 148, 4 I.C. 449 [lease]; *Palaniappa* v. *Deevasikamony* (1917) 44 I.A. 147, 40 Mad. 709, 39 I.C. 722, ('17) A.PC. 33 [lease]; *Vidya Varuthi* v. *Balusami* (1921) 48 I.A. 302, 44 Mad. 831, 65 I.C. 161, ('22) A.PC. 123 [lease]; *Konwar Doorganath* v. *Ramchunder* (1876) 2 Cal. 341, 351, 4 I.A. 52, 62 [lease]; *Shibessouree* v. *Mothooranath* (1869) 13 M.I.A. 270 [lease]; *Ramchandra* v. *Kashinath* (1895) 19 Bom. 271; *Prosunno Kumar* v. *Saroda* (1895) 22 Cal. 989; *Sheo Shankar* v. *Ram Shewak* (1897) 24 Cal. 77; *Parsotam Gir* v. *Dat Gir* (1903) 25 All. 296; *Ram Chandra* v. *Ram Krishna* (1906) 33 Cal. 507; *Muthusamier* v. *Sreemethanithi* (1915) 38 Mad. 356, 19 I.C. 694, ('16) A.M. 332; *Mahantha Jai Krishna* v. *Bhukhal* (1921) 6 Pat. L.J. 638, 65 I.C. 290, ('22) A.P. 165 [lease].

(*h*) (1869) 13 M.I.A. 270, *supra*.

(*i*) (1875) 14 Beng. L.R. 450, 459, 2 I.A. 145, 152, *supra*; *Pasupathinath Seal* v. *Pradyumnakumar Mullik* (1936) 63 Cal. 454.

It was at one time held that the *corpus* of endowed property could *not in any case* be sold or permanently alienated, though the *income* might be mortgaged for necessary purposes (*j*). But this view is no longer tenable.

A shebait cannot delegate his duties though he may appoint a sub-agent for the purpose of carrying out his duties in the usual course of business. A lease granted by a sub-agent without the knowledge of the shebait is not binding on the temple (*k*).

Permanent lease.—Except for unavoidable necessity, the head of a math cannot create any interest in the math property to enure *beyond his life* (*l*). A *permanent* lease of temple lands at a fixed rent, or rent-free for a premium, whether the lands are agricultural lands or a building site, is valid only if made for a necessity of the institution. It is not permissible by a local custom, or by a practice of the institution, to grant lands in that manner(*m*). In *Abhiram* v. *Shyama Charan* (*n*), where the question arose as to whether a permanent lease granted by a mohunt was valid; it was held that it was not, as there was no legal necessity for it. In the course of the judgment their Lordships of the Privy Council said : "The second question is whether the . . . the mohunt had power to grant a mokarrari pottah of the mouzah. It is well settled law that the power of the mohunt to alienate debutter property is, like the power of the manager for an infant heir, limited to cases of unavoidable necessity : *Prosunno Kumari Debya* v. *Golab Chand* (*o*). In the case of *Konwur Doorganath Roy* v. *Ram Chunder Sen* (*p*) a mokarrari pottah of debutter land, was supported on the ground that it was granted in consideration of money said to be required for the repair and completion of a temple, for which no other funds could be obtained. But the general rule is that laid down in the case of *Shibessouree Debia* v. *Mothooranath Acharjo* (*q*), that *apart from such necessity* 'to create a new and fixed rent for all time, though adequate at the time, in lieu of giving the endowment the benefit of an augmentation of a variable rent from time to time, would be a breach of duty in the mohunt. There is no allegation that there were any special circumstances of necessity in this case to justify the grant of the pottah of 1860, which on the most favourable construction enured only for the lifetime of the grantor."

Legal necessity.—In *Prosunno Kumari* v. *Golab Chand* (*r*) their Lordships of the Privy Council said : "The power, however [of a shebait], to incur debts must be measured by the *existing* necessity for incurring them." In that case it was found that the shebait was a man of profligate habits, and that he, having spent the income of the debutter property on his own pleasures, borrowed Rs. 4,000 to defray the expenses of the worship of the idol, and mortgaged the property as security for the advance. In a suit to enforce the mortgage a decree was passed for the motgagee providing for the realisation of the loan out of the profits of the mortgaged property. In a suit by the successor to set aside the decree, it was held that the debts having been contracted for legal necessity, the decree was binding upon the successor in office, and that decision was confirmed by the Judicial Committee. The principle of that decision was applied by the Judicial Committee in the later case of *Niladri Sahu* v. *Mahant Chaturbhuj Das* (*s*). In that case the mahant of a math borrowed money at 2 per cent. per mensem mainly for the purpose of constructing pakka buildings for the accommodation of wealthy devotees visiting the math and in part

(*j*) *Narayan* v. *Chintaman* (1881) 5 Bom. 393, *Collector of Thana* v. *Hari* (1882) 6 Bom. 546 ; *Nallayappa* v. *Ambalavana* (1904) 27 Mad. 465.

(*k*) *Shree Shree Gopal Shreedhar Mahadeb* v. *Shasheebhushan Sarkar* (1933) 60 Cal. 111, 142 I.C. 465, ('33) A.C. 109.

(*l*) *Vidya Varuthi* v. *Balusami* (1921) 48 I.A. 302, 44 Mad. 831, 65 I.C. 161, ('22) A. PC. 123 ; *Deosthan* v. *Ramdayal* (1944) Nag. 51.

(*m*) *Palaniappa* v. *Deevasikamony* (1917) 44 I.A. 147, 40 Mad. 709, 39 I.C. 722, ('17) A. PC. 33 ; *Gobinda Ramnuj Das Mohanta* v. *Mohanta Ramcharan Ramanuj Das* (1936) 63 Cal. 326 ; *Srimath Daivasikamani* v. *Periyanan Chetti* (1936) 63 I.A. 261, 59 Mad. 909, 38 Bom. L.R. 702, 162 I.C. 465, ('36) A.PC. 183.

(*n*) (1909) 36 Cal 1003, 36 I.A. 148, 165, 4 I.C. 44.

(*o*) (1875) 2 I.A. 145, 14 Beng. L.R. 450.

(*p*) (1876) 2 Cal. 341, 4 I.A. 52

(*q*) (1869) 13 M.I.A. 270.

(*r*) (1875) 2 I.A. 145, 151-152, 14 Beng. L.R. 450 [mortgage].

(*s*) (1926) 53 I.A. 253, 6 Pat. 139, 98 I.C. 576, ('26) A.PC. 112.

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for the ordinary expenses of the worship. Afterwards he mortgaged certain of the math properties at one per cent. per mensem in order to discharge the loan at two per cent. per mensem which was an accumulating burden upon the endowment. In a suit to enforce the mortgage it was held that the mortgage was for legal necessity so as to be within the power of the mahant, even if the original loans were incurred recklessly and not for the benefit of the math, which, however, was not shown to be the case. In the course of the judgment their Lordships said: "The importance of this case in its application to the present consists in this, that it was the immediate not the remote cause, *the causa causans* of the borrowing which has to be considered. The immediate cause of the borrowing was the math's need of money to carry on and pay for its services. The remote cause of the math's need was due to the profligate expenditure of the shebait. It would have been no answer to the creditor's suit to say: Your money was only borrowed because the income of the math was spent, by a profligate shebait, and there was no money available to carry on the services of the math. So in the present case. Even if the building scheme of the defendant had been reckless, inconsistent, unsound, and liable to fail, which has not been proved, what drove him to borrow this money Rs. 25,000 on mortgage, to pay old debts, and so be relieved of the oppressive burden which the exorbitant rate of interest at which the earlier loans were made imposed upon him? It was the high rate of interest, which he was already bound to pay, that was the necessary and immediate cause of his giving this mortgage, though the remote cause of it was the getting into debt by the building operation. In their Lordships' view the principle of the case above mentioned applied to this case."

Though a mahant has agreed in a suit to the validity of an alienation made without legal necessity, his successor is not bound by such agreement and it cannot prevent an investigation into the original nature of the transaction (*t*).

Constructing pakka buildings for the accommodation of visitors to a math is a legal necessity (*u*). So too is the rebuildings of a dining hall for feeding visitors (*v*).

"*For the benefit of the estate.*"—The phrase "benefit of the estate," as used in the decisions with regard to the circumstances justifying an alienation by the manager for an infant heir or by the trustee of a religious endowment, cannot be precisely defined but includes the preservation of the estate from extinction, its defence against hostile litigation, its protection from inundation, and similar circumstances (*w*). See s. 243A, where this subject is fully discussed.

415A. Burden of proof of necessity.—(*1*) Where an alienation is made of debutter property, the burden lies on the alienee to prove *either* that there was a legal necessity in fact, *or* that he made proper and *bona fide* enquiries as to the existence of such necessity and did all that was reasonable to satisfy himself as to the existence of such necessity. An order of Court giving a trustee or shebait leave to mortgage the trust property on the ground of necessity may be relied on by the mortgagee as *prima facie* evidence of his having made due and proper enquiries as to the necessity. Such an order cannot

(*t*) *Mahanth Ramdhan Puri* v. *Mst. Parbati Kuer* (1937) 16 Pat. 476, 171 I.C. 457, ('37) A.P. 219.

(*u*) *Niladri Sahu* v. *Mahant Chaturbhuj Das* (1926) 53 I.A. 253, 267, 6 Pat. 139, 98 I.C. 576, ('26) A.PC. 112.

(*v*) *Vibhudapriya* v. *Lakshmindra* (1927) 54 I.A. 228, 50 Mad. 497, 101 I.C. 545, ('27) A.PC. 131.

(*w*) *Palaniappa* v. *Deivasikamony* (1917) 44 I.A. 147, 155, 40 Mad. 709, 718, 39 I.C. 722, ('17) A.PC. 33.

be questioned on the ground of defect of procedure or incorrect exercise of jurisdiction (*x*). In fact, the rules as to burden of proof in the case of an alienee from a shebait or mohunt are the same as those which apply to the case of an alienee from the manager for an infant heir (*y*). Those rules are set forth in sections 182 and 244. The notes to section 243 may also be referred to as throwing further light on the subject. Where only a portion of the loan is proved to have been applied to purposes of necessity, the rule laid down in section 245 applies (*z*).

(*2*) Where the validity of a permanent lease granted by a shebait comes in question a long time after the grant, so that it is not possible to ascertain what were the circumstances in which it was made, the Court should assume that the grant was made for necessity so as to be valid beyond the life of the grantor (*a*).

416. Creditor's suit for money lent for legal necessity.—(*1*) Where a shebait or mohunt contracts a debt for legal necessity, the creditor is entitled to a decree against him providing for the payment of the decretal amount out of the profits of the debutter property even if no charge was created on the property to secure the loan. After the death of the debtor, the creditor is entitled to a similar decree against his successor (*b*).

(*2*) In a case where the loan was made for legal necessity, the proper decree to be passed in a creditor's suit, whether the loan be secured or unsecured, and whether the suit is brought against the debtor or his successor, is one directing the defendant to pay the decretal amount within a fixed period, and directing further that if the amount is not paid within that period, a receiver shall be appointed to realise the rents and profits of the debutter property and the proceeds from offerings, etc., and after payment of all expenses connected with the institution and the performance of the ceremonies and

(*x*) *Pashupathinath Seal* v. *Pradyumnakumar Mallik* (1936) 63 Cal. 454.

(*y*) *Konwar Doorganath* v. *Ramchunder* (1876) 2 Cal. 341, 351-352, 4 I.A. 52, 62-64; *Murugesam* v. *Manickavasaka* (1917) 44 I. A. 98, 40 Mad. 402, 39 I.C. 659, ('17) A. PC. 6.

(*z*) 2 Cal. 341, pp. 353-354, *supra*.

(*a*) *Bawa Magniram* v. *Kasturbhai* (1922) 49 I.A. 54, 46 Bom. 481, 66 I.C. 162, ('22) A.PC. 631 [lease impeached after 100 years].

(*b*) *Shankar* v. *Venkappa* (1885) 9 Bom. 422; *Srimath Daivasikamani* v. *Noor Mahomed* (1908) 41 Mad. 47; *Lakshmindrathirtha* v. *Raghuvendra* (1920) 43 Mad. 795, 59 I.C. 287, ('20) A.M. 678; *Sunderesan* v. *Viswanada* (1922) 45 Mad. 703, 72 I.C. 103, ('22) A.M. 402; *Vibhudapriya* v. *Lakshmindra* (1927) 54 I.A. 228, 230 (argument of counsel), 50 Mad. 497, 101 I.C. 545, ('27) A.PC. 131.

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festivals and a reasonable provision for the maintenance of the shebait or mohunt, the balance shall be applied in discharge of the plaintiff's debt until such debt has been paid off (*c*).

417. Decree against shebait or mohunt, when binding on successor.—It being competent to a shebait or mohunt to borrow money for necessary purposes, it follows that judgments obtained against a shebait or mohunt in respect of debts so incurred are binding upon his successors who form a continuing representation of the debutter or endowed property. But before applying the principle of *res judicata* to such judgments, the Court should be satisfied that the judgments relied upon were not obtained by fraud or collusion, and that the necessary and proper issues were raised, tried, and decided in the suits which led to them (*d*). If the decree is based on a compromise, the Courts should be satisfied that the compromise was entered into *bona fide* in the interest of the temple or math (*e*). See the Code of Civil Procedure, 1908, sec. 11, Expln. VI.

418. Devolution of office of mohunt.—(*1*) The succession to the office of mohunt depends on the usage of each particular math. As observed by their Lordships of the Privy Council, "the only law as to mohunts and their office, functions and duties, is to be found in custom and practice, which is to be proved by testimony." The custom that prevails in the majority of cases is that the mohunt nominates his successor by appointment during his lifetime or by will. Where there is no such custom, or where no nomination has been made, the usage of some institutions is to have a successor appointed by a system of election by all the mohunts of the sect in the neighbourhood. In some cases, the succession depends upon election by the disciples and followers of the math (*f*). Where a mohunt has the power to appoint his own successor, he cannot delegate

(*c*) *Vibhudapriya* v. *Lakshmindra* (1927) 54 I.A. 228, 50 Mad. 497, 101 I.C. 545, ('27) A.PC. 131; *Niladri Sahu* v. *Mahant Chaturbhuj Das* (1926) 53 I.A. 253, 6 Pat. 139, 98 I.C. 576, ('26) A.PC. 112.

(*d*) *Prosunno Kumari* v. *Golab* (1875) 14 Beng. L.R. 450, 2 I.A. 145.

(*e*) *Manikka* v. *Balagopala Krishna* (1906) 29 Mad. 553.

(*f*) *Geerdharee Doss* v. *Nundokissore Doss* (1867) 11 M.I.A. 405, 428; *Genda Puri* v. *Chatar Puri* (1887) 9 All. 1, 13 I.A. 100; *Ramalingam* v. *Vythilingam* (1893) 16 Mad. 490, 20 I.A. 150; *Ram Parkash Das* v. *Anand Das* (1916) 43 I.A. 73, 43 Cal. 707, 33 I.C. 583, ('16) A.PC. 256; *Lahar Puri* v. *Puran Nath* (1915) 42 I.A. 115, 37 All. 298, 29 I.C. 724, ('15) A.PC. 4; *Bhagaban* v. *Ram Praparna* (1895) 22 Cal. 843 [P.C.]; *Madho Das* v. *Kanta Das* (1878) 1 All. 539; *Vidyapurna* v. *Vidyanidhi* (1904) 27 Mad. 435; *Trimbakpuri* v. *Gangabai* (1887) 11 Bom. 514; *Bishambar Das* v. *Mst. Phulgari* (1930) 11 Lah. 673, 125 I.C. 621, ('30) A.L. 715.

or transfer that power to a mohunt of a neighbouring math or to any other person (*g*).

(*2*) *Partition.*—The headship of a math is not a matter of partition (*h*) ; nor is the property of the math (*i*).

In the case of a maurasi math, the senior chela succeeds ; *a fortiori* in the absence of a valid nomination by the reigning Mohunt (*j*).

Where the appointment of a successor is not made *bona fide* in the interests of the math, but in furtherance of the interests of the appointor, the appointment is invalid (*k*). Similarly a collusive appointment is not valid (*l*).

Where the head of a math designates his successor, but dies before the latter can be formally initiated, the appointment is nevertheless valid (*m*).

When the usage in a math consisting of several asthals has been to have only one mohunt, a separation of the office, it would seem, is improper, unless there are special circumstances justifying it (*n*).

419. Devolution of office of shebait.—(*1*) The devolution of the office of shebait depends on the terms of the deed or will by which it is created. Where there is no provision in the deed or will as to the succession, the title to the property or to the management and control of the property as the case may be, follows the line of inheritance from the founder, in other words, it passes to his heirs (*o*), unless there has been some usage or course of dealing which points to a different mode of devolution (*p*), *e.g.*, devolution on a single heir (*q*). This rule applies also where the right of nomination is given to a committee, but the committee has ceased to exist (*r*). But this rule cannot be applied so as to vest the shebaitship in

(*g*) *Mahanth Ramji* v. *Lachhu* (1902) 7 C.W.N. 145.

(*h*) *Sethuramaswamiar* v. *Meruswamiar* (1918) 45 I.A. 1, 9, 41 Mad. 296, 305, 43 I.C. 803, ('17) A.PC. 190.

(*i*) *Gobinda* v. *Ram Charan Das* (1925) 52 Cal. 748, 89 I.C. 804, ('25) A.C. 1107.

(*j*) (1925) 52 Cal. 748, 89 I.C. 804, ('25) A.C. 1107, *supra*.

(*k*) *Ramalingam* v. *Vythilingam* (1893) 20 I.A. 150, 16 Mad. 490 ; *Nataraja* v. *Kailasami* (1921) 48 I.A. 1, 44 Mad. 283, 57 I.C. 564, ('21) A.PC. 84.

(*l*) *Ram Parkash Das* v. *Anand Das* (1916) 43 I.A. 73, 43 Cal. 707, 33 I.C. 583, ('16) A. PC. 256.

(*m*) *Krishnagiri* v. *Shridhar* (1922) 46 Bom. 655, 67 I.C. 129, ('22) A.B. 202.

(*n*) *Ram Charan* v. *Gobinda* (1929) 56 I.A. 104, 56 Cal. 894, 114 I.C. 571, ('29) A.PC. 65.

(*o*) *Ganesh Chunder Dhur* v. *Lal Beharo Dhur* (1936) 63 I.A. 448, 38 Bom. L.R. 1250, 164 I.C. 347, ('36) A.PC. 318 ; *Bhabha Tarini Devi* v. *Asha Lata Devi* (1943) 2 Cal. 137, 207 I.C. 377, ('43) A.PC. 89 ; *urendra Narayan Sarbhadhikari* v. *Bholanath Ray Chaudhari* (1944) 1 Cal. 139.

(*p*) *Gosami Sri Girdhariji* v. *Romanlalji* (1890) 17 Cal. 3, 16 I.A. 137 ; *Jagadindra Nath* v. *Hemanta* (1905) 32 Cal. 129, 31 I.A. 203 ; *Gnanasambanda* v. *Velu* (1900) 23 Mad. 271, 27 I.A. 69 ; *Janoki* v. *Gopal* (1883) 9 Cal. 766, 10 I.A. 32 ; *Rajah Vurmah* v. *Ravi Vurmah* (1876) 1 Mad. 235, 4 I.A. 76 ; *Rajah Muttu* v. *Perianayagum* (1874) 1 I.A. 209 ; *Mohan* v. *Madhsuddan* (1910) 32 All. 461, 6 I.C. 77 ; *Sheo Prasad* v. *Aya Ram* (1907) 29 All. 663 ; (1918) 45 I.A. 1, 41 Mad. 296, 43 I.C. 806, ('17) A.PC. 190, *supra* ; *Sheoratan* v. *Ram Pargash* (1896) 18 All. 227 ; *Chandrika Bakksh Singh* v. *Bhola Singh* (1938) 13 Luck. 344, 168 I.C. 593, ('37) A.O. 373 ; *Gulab Dass* v. *Manohar Dass* (1938) 13 Luck. 577, 171 I.C. 81, ('37) A.O. 490 ; *Mst. Anuragi Kuer* v. *Paramanand Pathak* (1939) Pat. 171.

(*q*) *Ayiswaryanandaji* v. *Sivaji* (1926) 49 Mad. 116, 92 I.C. 928, ('26) A.M. 84.

(*r*) *Dharam Narain* v. *Suraj Narain* (1940) All. 815, 193 I.C. 697, ('41) A.A.1.

S. 419 persons who, according to the usages of the worship, cannot perform the rites of the office (*s*).

The principle that a female heir takes only as limited owner applies to shebait interest also (*t*).

(*2*) When the office has become vested by descent in more than one person, it is lawful for the parties interested to arrange among themselves for the due execution of the functions belonging to the office in turn or in some settled order and sequence (*u*). If the parties do not agree, then, if the right to worship carries with it the right to receive offerings, any one of them may sue for a division of the right just as he may sue for partition of the joint family property, and to have periods fixed during which he may exercise the right. Such a right is " property " liable to partition, and the joint owners are entitled to perform the worship in turn (*v*). But if the right to worship does not carry with it the right to receive offerings, a suit for a division of the right does not lie. In such a case the parties are bare managers or trustees, and the debutter property must be managed by them jointly (*w*). But a civil court is competent to entertain a suit the object of which is to have a scheme framed for the administration of a private Debutter. If the deity is interested in the result of the suit the deity will be made a party and, in cases in which the interests of the Shebaits are adverse to those of the deity, it will have to be represented by a disinterested person; but if the only dispute relates to the right of management and the deity's interests will not be affected by the adjustment of the individual rights of the shebaits the deity is not a necessary party (*x*). A worshipper has no unqualified right to sue for a declaration that certain property is debutter property of the idol; if the shebait is negligent or alienates the property in breach of trust either a prospective shebait or a member of the family (in case of a family endowment) may maintain the suit (*y*). One of two shebaits cannot sue for his half

(*s*) *Mohan Lalji* v. *Gordhan Lalji* (1913) 35 All. 283, 40 I.A. 97, 19 I.C. 337.

(*t*) *Mst. Anuragi Kuer* v. *Parmanand Pathak* (1939) Pat. 171.

(*u*) *Ramanathan* v. *Murugappa* (1906) 29 Mad. 283, 33 I.A. 120; *Meenakshi* v. *Somasundaram* (1921) 44 Mad. 205, 59 I.C. 464, ('21) A.M. 388.

(*v*) *Mitta* v. *Neerunjun* (1874) 14 Beng. L.R. 166, approved in *Pramatha Nath* v. *Pradyumna Kumar* (1925) 52 I.A. 245, 52 Cal. 809, 87 I.C. 305, ('25) A.PC. 139; *Mancharam* v. *Pranshankar* (1882) 6 Bom. 298; *Limba* v. *Rama* (1889) 13 Bom. 548; *Trimbak* v. *Lakshman* (1896) 20 Bom. 495; *Sethuramaswamiar* v. *Meruswamiar* (1911) 34 Mad. 470, 4 I.C. 76.

(*w*) *Sri Raman* v. *Sri Gopal* (1897) 19 All. 428.

(*x*) *Bimal Krishna Gosh* v. *Jnanendra Krishna Gosh* (1937) 2 Cal. 105, 172 I.C. 161, ('37) A.C. 338.

(*y*) *Sashi Kumari Devi* v. *Dhirendra Kishore Roy* (1941) 1 Cal. 309, 196 I.C. 241 ('41) A.C. 248.

share of the royalty due to the deity under a lease (z). If the parties are members of a joint family governed by the Mitakshara law, the senior male member is entitled to manage the property; the other members are not entitled to demand the exercise of the right by rotation (a). **Ss. 419, 420**

The founder himself may appoint joint shebaits (b). In *Pramatha Nath* v. *Pradyaumna* (c), the question arose whether one of three brothers, who was entitled under an arrangement between themselves to his annual turn of worship, had the right to remove the idol to his own house during his turn of worship. The Judicial Committee held that the idol could not be regarded as a mere chattel, and that the will of the idol as to its location must be respected, and the suit was remanded in order that the idol might appear by a disinterested next friend to be appointed by the Court.

(3) *Nomination by will.*—There is a conflict of decisions as to whether a shebait can nominate his successor by will. It has been held by the High Court of Calcutta that he cannot, unless there be a usage justifying a nomination by will (d). On the other hand it has been held by the High Court of Bombay, that a valid devise may be made of the office of shebait, provided the devisee is a person standing in the line of succession, and is not disqualified by personal unfitness (e). The High Court of Allahabad has taken much the same view as the Calcutta High Court (f). However that may be, it is clear that where a person is appointed shebait *with a power of appointing his successor*, he may nominate his successor by an act *inter vivos* or by will. If he dies without exercising the power, the office reverts to the founder or his heirs (g). It is not competent for a shebait by his own act to alter the line of succession to the office of the Shebait. But if he makes a fresh grant to the existing endowment making a new line of shebaits an essential condition to the grant, the grant may be rejected on behalf of the deity but if it is accepted it must be accepted subject to the condition (h).

420. Transfer of right of management.—(1) *Sale.*—A sale by a shebait or mohunt of his right to manage debutter property is void, even though the transfer may be coupled

(z) *Barabani Coal Concern Ltd.* v. *Gokulananda Mohan Thakur* (1934) 61 I.A. 35, 61 Cal. 313, 147 I.C. 884, ('34) A.PC. 77.

(a) *Thandavaroya* v. *Shunmugam* (1909) 32 Mad. 167, 2 I.C. 341.

(b) *Asita Mohan* v. *Nirode Mohan* (1920) 47 I.A. 140, 24 C.W.N. 794, ('20) A.PC. 129.

(c) (1925) 52 I.A. 245, 52 Cal. 809, 87 I.C. 305, ('25) A.PC. 139.

(d) *Rajeshwar* v. *Gopeshwar* (1908) 35 Cal. 226.

(e) *Mancharam* v. *Pranshankar* (1882) 6 Bom. 298.

(f) *Chandranath* v. *Jadabendra* (1906) 28 All. 689; *Goswami Puran Lalji* v. *Ras Bihari Lal* (1922) 44 All. 590, 67 I.C. 328, ('22) A.A. 285.

(g) *Annasami* v. *Ramakrishna* (1901) 24 Mad 219; *Ranjit Singh* v. *Jagannath* (1886) 12 Cal. 375; *Jagannath* v. *Ranjit Singh* (1898) 25 Cal. 354; *Radha Nath Mukerji* v. *Shaktipada Mukerji* (1936) 58 All. 1053, 164 I.C. 595, ('36) A.A. 624.

(h) *Nirmal Kumar Banerji* v. *Jyoti Prasad Banerji* (1941) 2 Cal. 128, 197 I.C. 763, ('42) A.C. 99.

S. 420 with an obligation to manage the property in conformity with the trust attached thereto (*i*). Nor can the right be sold in execution of a decree against him (*j*). Even if a custom be proved which sanctions the sale of such a right, the Courts should refuse to recognize it, as being against public policy, especially where the sale is made to a stranger for the pecuniary benefit of the vendor. In *Rajah Vurmah* v. *Ravi Vurmah* (*k*), which was a case of a sale by the Urallers (managers) of a certain pagoda of their right to manage the pagoda, the Judicial Committee said: "Their Lordships are of opinion that no custom which can qualify the general principle of law has been established in this case; and they desire to add that if the custom set up was one to sanction not merely the transfer of a trusteeship, but as in this case the sale of a trusteeship for the pecuniary advantage of the trustee, they would be disposed to hold that that circumstance alone would justify a decision that the custom was bad in law."

(2) *Gift.*—It was held in Bombay that it is competent to the shebait to renounce his right of management and transfer it to a person standing in the line of succession, provided the transferee is not disqualified by personal unfitness (*l*). The correctness of this decision has been very much doubted. Where there are several joint shebaits, they may renounce their right in favour of any one of them, provided the arrangement is for the benefit of the endowment (*m*). The transfer of a shebait right or of the idol with the endowed property is invalid in law (*n*). A gift of the right of management made to a *stranger* is not valid, unless it is sanctioned by custom (*o*). A *bona fide* compromise by the plaintiff in a suit for the office of shebait relinquishing the claim in favour of the person in possession of the office who would be entitled to it after the plaintiff, is valid (*p*).

As to transfer of right to receive offerings, see note to s. 422.

Removal of image from one temple to another.—The manager of a public temple has no right to remove the image from the temple, in which it is installed and instal it in

(*i*) *Raja Vurmah* v. *Ravi Vurmah* (1876) 1 Mad. 235, 4 I.A. 76; *Gnanasambanda* v. *Velu* (1900) 23 Mad. 271, 27 I.A. 69; *Kuppa* v. *Dorasami* (1882) 6 Mad. 76; *Gobinda Ramanuj Das Mohanta* v. *Mohanta Ramcharan Ramanuj Das* (1936) 63 Cal. 326.

(*j*) *Durga* v. *Chanchal* (1882) 4 All. 81; *Ganesh* v. *Shankar* (1883) 10 Bom. 395.

(*k*) (1876) 1 Mad. 235, 4 I.A. 76, 84-85.

(*l*) *Mancharam* v. *Pranshankar* (1882) 6 Bom. 298, 300.

(*m*) *Nirad* v. *Shibdas* (1909) 36 Cal. 975, 3 I. C. 76; *Narayana* v. *Ranga* (1892) 15 Mad. 183.

(*n*) *Surendra Narayan Sarbadhikari* v. *Bhola Nath Ray Chaudhuri* (1944) 1 Cal. 139.

(*o*) *Rajaram* v. *Ganesh* (1899) 23 Bom. 131; *Ukoor Doss* v. *Chunder* (1865) 3 W. R. 152.

(*p*) *Srimathi Sabitri Thakurain* v. *Mrs. Savi* (1933) 12 Pat. 359, 145 I.C. 1, ('33) A.P. 306.

a new building especially when the removal is objected to by a majority of the worshippers (q).

421. Rights of Founder.—(*1*) According to the Hindu law, when the worship of an idol has been founded, the shebaitship is held to be vested in the founder and his heirs, unless—

(a) he has disposed of it otherwise ; or

(b) there has been some usage or course of dealing which points to a different mode of devolution (*r*) [s. 419].

This principle applies to private as well as public trusts (*s*). The founder may appoint another person to manage the trust on his behalf and when he does so he can supervise his actions and remove him if he misbehaves. But where the founder hands over all his rights to another and divests himself of every vestige of interest in the matter , he cannot subsequently sue for being restored to the right of management (*t*).

(*2*) The ruling in *Tagore* v. *Tagore* (*u*), that all estates of inheritance created by gift or will, so far as they are inconsistent with the general law of inheritance, are void as such, and that by Hindu law no person can succeed thereunder as heir to estates described in terms which English law would designate estates tail, is applicable to an hereditary office and endowment as well as to other immoveable property. A Hindu, therefore, cannot by gift or will direct that the office of shebait shall be held by his sons, grandsons and their male descendants in perpetuity (*v*). The right to the office of shebait is subject to the rules in ss. 372, 382 and 392 (*w*) above. These rules do not apply to the Dharmakarthaship of a temple which is not a species of property and unlike shebait-ship and therefore, where the founder provided that the office of trusteeship should be held by his descendants both in the male and the female line, it was held that the provision is valid (*x*).

(*q*) *Hari* v. *Antaji* (1920) 44 Bom. 466, 56 I.C. 459, ('20) A. B. 67.

(*r*) *Gosami Sri Girdhariji* v. *Romanlalji* (1890) 17 Cal. 3, 16 I.A. 137 ; *Jagadindra Nath* v. *Hemanta* (1905) 32 Cal. 129, 31 I. A. 203 ; *Mohan Lalji* v. *Madhsudan* (1910) 32 All. 461, 6 I.C. 77 ; *Kalikrishna* v. *Makhan Lal* (1923) 50 Cal. 233, 72 I.C. 686, ('23) A.C. 160 ; *Sheo Prasad* v. *Aya Ram* (1907) 29 All. 663 ; *Mst. Anuraji Kuer* v. *Parmanand Pathak* (1939) Pat. 171.

(*s*) *Prakkash Chandra Nag* v. *Subodh Chandra Nag* (1937) 1 Cal. 575, 170 I.C. 290, ('37) A.C. 67.

(*t*) *Gangaram* v. *Dooboo* (1936) Nag. 111, ('36) A.N. 223.

(*u*) (1872) I. A. Supp. 47, 9 Beng. L. R. 377.

(*v*) *Gnanasambanda* v. *Velu* (1899) 27 I.A. 69, 23 Mad. 271 ; *Gopal Chunder* v. *Kartick Chunder* (1902) 29 Cal. 716 [P.C.] ; *Chandra Chur Dev* v. *Vibhuti Bhushan Deva* (1944) 23 Pat. 763.

(*w*) *Manohar Mukherji* v. *Bhupendranath Mukherji* (1933) 60 Cal. 452, 141 I.C. 544, ('32) A.C. 791 ; *Kandarpa Mohan Goswami* v. *Akshayachandra Basu* (1934) 61 Cal. 106, 150 I.C. 179, ('34) A.C. 379 ; *Ganesh Chunder Dhur* v. *Lal Behari Dhur* 63 I.A. 448, 38 Bom. L.R. 1250, 163 I.C. 347, ('36) A.PC. 318.

(*x*) *Manathunainath Desikar* v. *Gopala Chettiyar & Ors.* (1943) Mad. 858, ('44) A.M. 1.

Ss. 421, 422

As to the appointment as shebait of a person born after the death of the founder, see notes to s. 372, "Exceptions to the rule."

(3) Where the founder has prescribed a line of succession of the office of shebait, but the succession to the office has entirely failed, the right of management reverts to the founder and his heirs (y). But the founder is not entitled to alter the line of succession or to interfere in the management, unless he has, by the deed of endowment, reserved the right to do so (z).

(4) Once a grant is made for religious purposes, it becomes irrevocable (a). The beneficial ownership cannot under any circumstances revert to the founder or his heirs. If the objects of the endowment are not carried out, the founder or his heirs may bring a suit to have the funds applied to their lawful purposes, but they cannot resume the grant (b). If the trust fails for want of objects, they may move the Court to apply the funds *cy-pres*, that is to say, to other objects as nearly as may be of a similar character (c).

Where there has been no permanent endowment but only a temporary arrangement isnot irrevocable (d).

The person providing the original endowment is the founder. But persons who subsequent to the foundation, furnish additional contributions, do not thereby become founders; their benefaction is regarded as merely an accretion to an existing foundation (e).

See the Code of Civil Procedure, 1908, ss. 92 and 93.

422. Offerings.—Offerings made to an idol belong to the idol as much as land dedicated to an idol, and not to the officiating priest, unless there be a custom or an express declaration by the founder to the contrary. Such offerings are intended to contribute to the maintenance of the shrine with all its rites, ceremonies and charities, and not to become the personal property of the priest (f). But there may be

(y) *Jai Bansi* v. *Chattar* (1870) 5 Beng. L. R. 181; *Hori Dasi* v. *Secretary of State* (1880) 5 Cal. 228; *Sheoratan* v. *Ram Pargash* (1896) 18 All. 227; *Jagannath* v. *Runjit Singh* (1898) 25 Cal. 354; *Gopal Chunder* v. *Kartrick Chunder* (1902) 29 Cal. 716; *Sheo Prasad* v. *Aya Ram* (1907) 29 All. 663; *Chaturbhuj Singh* v. *Sarada Charan Guha* (1932) 11 Pat. 701, 141 I.C. 157, ('33) A.P. 6; *Radhanath Mukerji* v. *Shakthipatha Mukerji* (1936) 58 All. 1053, 164 I.C. 505, ('36) A.A. 624; *Chandrika Baksh Singh* v. *Bhola Singh* (1938) 13 Luck. 344, 168 I.C. 593, ('37) A.O. 373; *Gulabdoss* v. *Manohar Dass* (1938) 13 Luck. 677, 171 I.C. 81, ('37) A.O. 490; *Chandra Choor Dev* v. *Vibhuti Bhushan Deva* (1944) 23 Pat. 763.

(z) *Gaurikumari* v. *Ramanimoyi* (1923) 50 Cal. 197, 70 I.C. 175, ('23) A.C. 30; *Teertaruppa* v. *Soonderarajien* (1851) Mad. S.D.A. p. 57; *Brindaban* v. *Sri Godamji* (1937) All. 555, 165 I.C. 217, ('37) A.A. 394.

(a) *Juggut Mohini* v. *Sokheemoney* (1871) 14 M.I. A. 289, 302.

(b) *Ram Narayan* v. *Ramoon* (1874) 23 W.R. 76; *Mohesh Chunder* v. *Koylash Chunder* (1869) 11 W.R. 443.

(c) *Mayor Lyons* v. *Adv.-Gen. of Bengal* (1876) 26 W.R. 1.

(d) (1932) 11 Pat. 701, 141 I.C. 157, ('33) A.P. 6, *supra*.

(e) *Appasami* v. *Nagappa* (1884) 7 Mad. 499; *Annasami* v. *Ramakrishna* (1901) 24 Mad. 219; *Gosami Sri Girdhariji* v. *Romanlalji* (1889) 16 I.A. 137, 147, 17 Cal. 3, 23; *Ananda Chandra* v. *Braja Lal* (1923) 50 Cal. 292, 301-302, 74 I.C. 793, ('23) A.C. 142.

(f) *Manohar* v. *Lakshmiram* (1888) 12 Bom. 247, 265, affd. in *Chotalal* v. *Manohar* (1900) 24 Bom. 50, 26 I. A. 199; *Girijanund* v. *Sailajanund* (1896) 23 Cal. 645; *Shibessouree* v. *Mothooranath* (1869) 13 M.I.A. 270, 273 [as to rents].

cases in which the offerings, though made to the idols are received by certain persons and when they are so received independently of any obligation to render services they are alienable and attachable (*g*). Ss. 422, 423

The right to receive offerings from pilgrims resorting to a temple or shrines inalienable (*h*).

423. Removal of shebaits and mohunts—Scheme for management.—The Courts have jurisdiction to deal with the managers of public Hindu temples, and, if necessary for the good of the religious endowment, to remove them from their position as managers (*i*). The Court may also remove a shebait of a private endowment for misconduct and direct him to render accounts for a certain period in its discretion. Though ordinarily all the shebaits must join in a suit on behalf of the idol, when the suit is for the removal of a shebait for misconduct, this rule need not be followed. Such a suit by one of the shebaits is maintainable (*j*). It is sufficient ground for removing a shebait from his office that in the exercise of his duties he has placed himself in a position, in which the Court thinks that he can no longer faithfully discharge the obligations of the office (*k*). A member of the interested community may sue in a representative capacity for rendition of accounts of the profits collected by the shebait but is not entitled to call upon the defendant to hand over the funds of the temple except on proof of gross mismanagement or misapplications of the funds (*l*). But a mere mistake on the part of the manager as to his true legal position or a mere laxity of management on his part not accompanied by any fraud or dishonest misappropriation, does not of necessity afford a ground for removing him from his post of manager, and entrusting it to new hands. In such a case, the Court may appoint a committee to supervise and control him, and, if necessary, frame a scheme for the management of the temple. It does not make any difference that the office is a hereditary office (*m*).

(*g*) *Nand Kumar Datt Ganesh Das* (1930) 58 All. 457, 159 I.C. 812, ('36) A.A. 131.

(*h*) *Puncha* v. *Bindeswari* (1916) 43 Cal. 28, 28 I.C. 675, ('16) A.C. 269.

(*i*) *Chintaman* v. *Dhondo* (1891) 15 Bom. 612; *Ram Parkash Das* v. *Anand Das* (1916) 43 I.A. 73, 43 Cal. 707, 33 I.C. 583, ('16) A.PC. 256; *Srinivasa* v. *Evalappa* (1922) 49 I.A. 237, 253-254, 45 Mad. 565, 583-585, 68 I.C. 1, ('22) A.PC. 325 [concocting of accounts].

(*j*) *Nirmal Kumar Banerji* v. *Jyoti Prasad Banerji* (1941) 2 Cal. 128, 197 I.C. 763, ('42) A.C. 99.

(*k*) *Peary Mohan* v. *Monohar* (1921) 48 I.A. 258, 48 Cal. 1019, 62 I.C. 76, ('22) A.PC. 235.

(*l*) *Phultibai* v. *Shri Deo Mandir* (1942) Nag. 555, 202 I.C. 185, ('42) A.N. 105.

(*m*) *Annaji* v. *Narayan* (1897) 21 Bom. 556; *Damodar* v. *Bhogilal* (1898) 22 Bom. 493; *Tiruvengadath* v. *Srinivasa* (1899) 22 Mad. 361; *Manohar* v. *Lakhmiram* (1888) 12 Bom. 247, affd. in *Chotalal* v. *Manohar* (1900) 24 Bom. 50, 26 I.A. 199; *Prayag Dass* v. *Tirumala* (1907) 30 Mad. 138, 34 I.A. 78, in app. from 28 Mad. 319; *Thackersey* v. *Hurbhum* (1884) 8 Bom. 432; *Sivashankara* v. *Vadagiri* (1890) 13 Mad. 6; *Nelliappa* v. *Punnaivanam* (1927) 50 Mad. 567, 101 I.C. 420, ('27) A.M. 614.

Ss. 423, 424

As to the framing of a scheme, see the Code of Civil Procedure, ss. 92 and 93. No scheme can be framed *under those sections* in the case of a *private* endowment (*n*).

Where a person claiming as his own what is really a public charity appoints a trustee to manage the property, the appointment is invalid (*o*).

424. Distinction between public and private endowments.—(*1*) Religious endowments are either public or private. In a public endowment the dedication is for the use or benefit of the public. When property is set apart for the worship of a *family* god in which the public are not interested, the endowment is a private one (*p*). Where the main purpose of the endowment was the puja of a deity established by the settlor in a house, and the surplus income was directed to be utilised for feeding the poor and helping the students, it was held the trust was a private trust and that all the trustees must join in its execution (*q*). The distinction between public and private endowments is important, for it has been held by the Judicial Committee that, where a temple is a public temple, the dedication may be such that the family itself could not put an end to it, but in the case of property dedicated to a family idol, the consensus of the whole family might give the property another direction (*r*). This is regarded as one test to determine whether the endowment is private or public (*s*). It has accordingly been held that where the heirs of the founder are unable to carry on the worship of the *family idol* out of the income of the endowment, they may transfer the idol and its property to another family for the purpose of carrying on the worship. Such a transfer, if made without consideration and for the benefit of the idol, is valid and binding on the heirs of the transferors (*t*). In other respects, however, there is no distinction between the two kinds of endowments. Thus property dedicated to the services of a family idol cannot be alienated except for unavoidable necessity, nor can it be taken in execution of a personal decree against the shebait (*u*) [s. 415].

(*2*) In *Konwar Doorganath* v. *Ram Chunder* (*v*), their Lordships of the Privy Council observed: "Where the temple is a public temple, the dedication may be such that the family itself could not put an end to it but in the case of a family

(*n*) *Gopal Lal Sett* v. *Purna Chandra Basak* (1922) 49 I.A. 100, 49 Cal. 459, 67 I.C. 561, ('22) A.PC. 253.

(*o*) *Vaidyanatha* v. *Swaminatha* (1924) 51 I.A. 282, 47 Mad. 884, 82 I.C. 804, ('24) A.PC. 221.

(*p*) *Jugalkishore* v. *Lakshmandas* (1899) 23 Bom. 659.

(*q*) *Prasad Das Pal* v. *Jagannath Pal* (1933) 60 Cal. 538, 144 I.C. 894, ('33) A.C. 519.

(*r*) *Konwar Doorganath* v. *Ram Chunder* (1876) 2 Cal. 341, 347, 4 I.A. 52, 58.

(*s*) *Ram Prasad* v. *Ram Krishna Prasad* (1932) 11 Pat. 594, 138 I.C. 331, ('32) A.P. 177.

(*t*) *Khetter Chunder* v. *Hari Das* (1890) 17 Cal. 557.

(*u*) *Rupa* v. *Krishnaji* (1885) 9 Bom. 169.

(*v*) (1877) 2 Cal. 341, 4 I.A. 52, 58.

idol, the consensus of the whole family might give the estate another direction." This dictum was followed in a Calcutta case (*w*) where it was held that properties dedicated to a family idol may be converted into secular property by the consensus of the family and that in that particular case the properties had been so converted with common consent. The correctness of this decision has been doubted in subsequent cases, and it has been said that even if the consent of the family could effect such a diversion, it must be the consent of all members of the family, both males and females, as they are all interested in the worship of the idol (*x*). **Ss. 424-426**

The Religious Endowments Act, 1863.—The Religious Endowments Act, 1863, does not apply to *private* endowments (*y*). As to the history of the Act and the cases to which it applies, see Mulla's Code of Civil Procedure, notes to s. 92. See also Prannath Sarasvati's Tagore Lectures on the Hindu Law of Endowments.

As to the tests for determining whether a temple is a public or a private charity, see the cases in foot-note (*z*). Where there was a complete dedication, the temple being built in a place removed from the residential house of the testator and the public having free access, it was held that the temple was a public temple and the existence of a samadhi in memory of religious persons is not inconsistent with this conclusion (*a*). In a case where the members of the family treated the temples as a family property, dividing profits (offerings or rents), excluding the public from worship at the time of marriages and other ceremonies in their home erecting samadhis in honour of the dead, it was held that the mere fact the public are not turned away ordinarily from the temple worship in the temple does not show that it was a public temple (*b*).

Though maths as a rule are public endowments, a math may be a private institution (*c*).

425. Right of worship.—Where a temple is established for the worship of members of a particular sect, persons belonging to other sects are not entitled to worship in the temple (*d*).

Fees for admission to the sanctuary of a temple.—Rules prohibiting, except upon payment of fixed fees, entry into the inner sanctuary of a temple, are illegal (*e*).

426. Limitation.—(*1*) *Unauthorized alienation by shebait and mohunt.*—Where the head of a math grants a permanent lease of math property or sells it without legal necessity, or

(*w*) *Gobinda Kumar* v. *Debendra Kumar* (1907) 12 C.W.N. 98.

(*x*) *Gopal* v. *Radha* (1925) 41 Cal. L.J. 396, 426, 88 I.C. 616, ('25) A.C. 996; *Chandi Charan* v. *Dulal Chandra* (1927) 54 Cal. 30, 98 I.C. 684, ('26) A.C. 1083.

(*y*) *Protap Chandra* v. *Brojonath* (1892) 19 Cal. 275.

(*z*) *Purariya* v. *Poonachi* (1921) 40 Mad. L.J. 289, 62 I.C. 655; *Parmanand* v. *Nihal Chand* (1938) 65 I.A. 252, 1938 Lah. 453, 40 Bom. L.R. 907, 175 I.C. 459, ('38) A.PC. 195.

(*a*) *Premo* v. *Sheo Nath Pande* (1933) 8 Luck. 266, 140 I.C. 896, ('33) A.O. 22.

(*b*) *Babu Bhagwan Din* v. *Gir Har Sarup* (1940) 15 Luck. 1, 185 I.C. 305, 67 I.C. 1, ('40) A.PC. 7.

(*c*) *Sathappayyar* v. *Periasami* (1891) 14 Mad. 1.

(*d*) *Sankaralinga* v. *Rajeswara* (1908) 31 Mad. 236, 35 I.A. 176.

(*e*) *Ashayam* v. *Manager of Dakore Temple Committee* (1920) 44 Bom. 150, 55 I.C. 956, ('20) A.B. 153.

S. 426 where the math property is sold in execution of a decree passed against him for a debt not contracted for a legal necessity, the question arises as to the period of limitation for a suit by his successor for possession of the property. Difficulties frequently arose as regards this question, and the Indian Limitation Act, 1908, was amended by Act 1 of 1928 to meet those difficulties. This was done by inserting a new paragraph in sec. 10 of the Act of 1908, and four new articles in Schedule I to the Act, namely, 134A, 48B, 134B and 134C. The Act of 1928 came into force on the 1st January, 1929. As this Act can apply only to transfers made on or after the 1st January, 1929, it will be convenient first to state the law applicable to transfers made before that date, and then to set out the amendments made by that Act.

As regards transfers made before the 1st January, 1928, the law as gathered from the cases appears to be as follows :—

(a) *Law before Amendment.*—Where the head of a math grants a permanent lease of math lands without legal necessity, the period of limitation for a suit by his successor for possession of the land is 12 years as provided by art. 144 of Schedule I to the Indian Limitation Act, 1908, the starting point of limitation being the date of the *death of the grantor*. The reason is that the head of a math is entitled to grant a lease during the period of his life, and there can therefore be no adverse possession until his death (*f*). If the lessee's possession is consented to by his successor, the consent is referable to a new tenancy created by him, and the starting point of limitation for a suit for possession by his successor is again the *date of his death* (*g*). But a gumastha who was not specially authorised to do so by the proprietor has no right to start a new tenancy by recognition of the lessee or by acceptance of rent. His conduct cannot estop the proprietor from challenging the tenancy (*h*).

(*f*) *Srimath Daivasikamani* v. *Periyanan Chetti* (1936) 63 I.A. 261, 59 Mad. 809, 38 Bom. L.R. 702, 162 I.C. 465, ('36) A. PC. 183.

(*g*) *Vidya Varuthi* v. *Balusami* (1921) 48 I.A. 302, 44 Mad. 831, 65 I.C. 161, ('22) A. PC. 123, reversing *Balaswami* v. *Venkataswamy* (1917) 40 Mad. 745, 40 I. C. 531, ('18) A.M. 984; *Abdur Rahim* v. *Narayan Das* (1923) 50 I.A. 84, 50 Cal. 329, 71 I.C. 646, ('23) A.PC. 44 [last mutawali in possession within 12 years of suit—held suit by successor not barred]; *Deosthan* v. *Ramdayal* (1944) Nag. 51.

(*h*) *Mahanth Biseshwar Dass* v. *Sashinath Jha* (1943) 22 Pat. 183, 208 I.C. 129, ('43) A.P. 289.

(*b*) Where *debutter* lands have been *sold in execution* of a decree against a shebait or a mohunt for a debt not contracted for a legal necessity, the period of limitation for a suit for possession by his successor is 12 years from the *date of the sale* under art. 144 (*i*).

(c) Where there has been a *private sale* by a shebait or a mohunt of *debutter* lands without legal necessity the balance of opinion is in favour of the view that the period of limitation is 12 years from the *date of the sale* under art. 144, and not the date of the vendor's death as in the case of a lease (*j*). Where lands belonging to a math have passed under an assignment of the math and all its properties, the transaction is void and the cause of action to recover the property arises from the date of the transaction (*k*). But where the mohunt sells an item of property belonging to the math, the cause of action accrues to the successor only at his death as the transaction is only a voidable transaction (*l*).

The endowments of a Hindu math are not "conveyed in trust," nor is the head of the math a "trustee" with regard to them, save as to specific property proved to have been vested in him for a specific object. Consequently art. 134 of Sch. I of the Indian Limitation Act, 1908, which contains the expressions above quoted, does not apply where the head of a math has granted a permanent lease of part of its property not proved to be vested in him subject to a specific trust (*m*).

(*2*) *Amendments.*—Before the Indian Limitation (Amendment) Act 1 of 1929 neither a shebait nor a mohunt was regarded as a trustee of the *debutter* property. By that Act, sec. 10 of the Indian Limitation Act, 1908, was amended, and the following paragraph was inserted in it :—

"For the purposes of this section any property comprised in a Hindu, Muhammadan or Buddhist religious or charitable

(*i*) *Subbaiya* v. *Mahammad* (1923) 50 I.A. 295, 46 Mad. 751, 74 I.C. 492, ('23) A.PC. 175 [sale in execution of decree against manager of a chattram—suit brought more than 12 years after date of *sale*—held suit by successor barred].

(*j*) *Gnanasambanda* v. *Velu* (1900) 23 Mad. 271, 27 I.A. 69 [sale by shebait—purchaser in possession for upwards of 12 years from date of sale—held suit barred]; *Damodar Das* v. *Adhikari Lakhan Das* (1910) 37 I.C. 147, 37 Cal. 885, 7 I.C. 240, and *Ishwar Shyam* v. *Ram Kanai* (1911) 38 I.A. 76, 38 Cal. 526, 10 I.C. 683 [transfer by senior chela to junior chela by way of compromise—suit by successor of senior chela more than 12 years after date of transfer—held suit barred]; *Chitar Mal* v. *Panchu Lal* (1926) 48 All. 348, 93 I.C. 652, ('26) A.A. 392 [sale]; *Lal Chand* v. *Ramrup Gir* (1926) 53 I.A. 24, 5 Pat. 812, 93 I.C. 280, ('26) A.PC. 9 [sale by mahant-purchaser in possession for 26 years—held suit barred]; *Raja Manindra* v. *Sarat Chandra* (1926) 30 C.W.N. 740, 95 I.C. 644, ('26) A.C. 913; *Badri Narayan* v. *Mahant Kailash Gir* (1926) 5 Pat. 341, 93 I. C. 303, ('26) A. P. 239; *Naurangi* v. *Mahant Ram Charan* (1930) 9 Pat. 885, 127 I.C. 817, ('30) A.P. 455.

(*k*) *Ram Charan Das* v. *Naurangi Lal* (1933) 12 Pat. 251, 60 I.A. 124, 142 I. C. 214, ('33) A.PC. 75

(*l*) *Mr' · .eo Prasad Singh* v. *Karia Bharti* (1935) 57 All. 39, 62 I.A. 47, 153 I.C. 1100, ('35) A.PC. 4[illegible].

(*m*) *Vidya Varuthi* v. *Balusami* (1921) 48 I.A. 302, 315, 319, 44 Mad. 831, 65 I.C. 161, ('22) A.PC. 123.

S. 426 endowment shall be deemed to be property vested in trust for a specific purpose, and the manager of any such property shall be deemed to be the trustee thereof."

By the same Act the following new articles were inserted in Schedule I to the Act of 1908 :—

Description of suit.	Period of limitation.	Time from which period begins to run.
134A. Suit to *set aside* a *transfer* of *immoveable* property comprised in a Hindu, Muhammadan or Buddhist religious or charitable endowment, made by a manager thereof for a valuable consideration.	Twelve years.	When the *transfer* becomes known to the plaintiff.
48B. Like suit to set aside a *sale* of *moveable* property.	Three years.	When the *sale* becomes known to the plaintiff.
134B. Suit by the manager of a Hindu, Muhammadan or Buddhist religious or charitable endowment *to recover possession* of *immoveable* property comprised in the endowment which has been transferred by a previous manager for a valuable consideration.	Twelve years.	The death, resignation or removal of the *transferor*.
134C. Like suit to recover *possession of moveable* property which has been sold by a previous manager.	Twelve years.	The death, resignation or removal of the *seller*

Note.—Arts. 134A and 48B apply to suits by persons interested in the endowment. Arts. 134B and 134C apply to suits by the successor in office of the transferor or seller.

Art. 134-B, Limitation Act, applies to suits to set aside a lease of property comprised under a religious endowment, and where more than 12 years elapse the lease is binding on the actual mahant and he can only recover the agreed rent (*n*).

The transfer of a portion of a muth and the properties appertaining thereto by one mahant in favour of another in settlement of a *bona fide* dispute between the two mahants about the office of the mahant of the muth is a transfer for a valuable consideration.

Where the plaintiff's right had become barred by limitation before the Amending Act of 1929 was passed by reason of the adverse possession of the transferee over the muth properties from the date of the transfer, it cannot be revived by reason of the Amending Act (*o*).

(*3*) Where a shebait or mohunt is dispossessed of debutter property during his minority he is entitled to sue for possession within twelve years from the date of the dispossession or within

(*n*) *Ram Kishore Das Mohanta* v. *Ganga Gobinda Pati* (1937) 2 Cal. 242, 172 I.C. 315, ('37) A.C. 305.

(*o*) *Mahanth Biseshwar Dass* v. *Sashinath Jha* (1948) 22 Pat. 133, 208 I.C. 129, ('48) A.P. 289.

three years from the date on which he attains majority, whichever is the longer period. The fact that he has no proprietary interest in debutter property does not disentitle him to the benefit of the provisions of sec. 8 of the Indian Limitation Act, 1908 (*p*). S. 426

Where a shebait appointed for life died and his heirs took possession of the property, the suit by the heirs of the founder to recover the property was held to be governed by Art. 144 and not by Art. 120 (*q*).

(*4*) *Suit for possession of hereditary office.*—A suit for possession of an hereditary office must be brought within 12 years from the date when the defendant takes possession of the office adversely to the plaintiff or the plaintiff's predecessor in title (*r*).

Note that the office of a hereditary priest (*yajman vritti*) is *nibhanda* and is ranked among the hereditary rights of immoveable property (*s*).

(*p*) *Jagadindra Nath* v. *Hemanta* (1905) 32 Cal. 129, 31 I.A. 203.

(*q*) *Chandrika Baksh Singh* v. *Bhola Singh* (1938) 13 Luck. 344, 168 I.C. 593, ('37) A.O. 373.

(*r*) *Gnanasambanda* v. *Velu* (1900) 23 Mad. 271, 27 I. A. 69; Limitation Act, art. 124.

(*s*) *Ghelabhai* v. *Hargowan* (1912) 36 Bom. 94, 12 I.C. 928; *Dharam Narain* v. *Suraj Narain* (1940) All. 815, 193 I.C. 697, ('41) A.A. 1.

CHAPTER XXII.

MARRIAGE.

1. "The father, the paternal grandfather, the brother, a *sakulya* or member of the same family, the mother likewise in default of the first, the next in order if sound in mind, is to give a damsel in marriage; not giving becomes tainted with the sin of causing miscarriage at each of her courses; in default, however, of the (aforesaid) givers, let the damsel herself choose a suitable husband."—*Yajnavalkya*, i. 63-64.

2. "She who is the mother's non-*sapinda* and also (non-*sagotra*) and the father's (non-*sapinda*) and also (non-*sagotra*), is commended for the nuptial rite and holy union amongst the twice-born classes."—*Manu*, iii. 5.

"But *sapinda* relationship ceases in the seventh degree (from the mother and the father); and the *samanodaka* relationship ceases if (common) descent and name be not known."—*Manu*, v. 60.

S. 427 **427. Marriage, Minority, Lunacy, Fraud.**—(*1*) Marriage, according to the Hindu law, is a holy union for the performance of religious duties (*t*). It is not a contract; the mere fact, therefore, that a marriage was brought about during the minority of either party thereto, does not render the marriage invalid. The marriage of Hindu children is brought about by their parents, and the children themselves exercise no volition (*u*). But the marriage of a lunatic, it seems, is not valid (*v*). When a congenital idiot's marriage was arranged by his father and his wife gave birth to two sons it was held that he was lawfully married (*w*).

(*2*) A marriage brought about by force or fraud is altogether invalid (*x*) [Sec. 434].

It has been held by the High Court of Bombay that marriage is a *sanskara* or sacrament. It is the last of the ten sacraments, enjoined by the Hindu religion for purifying the body from inherited taint (*y*). The same view has been taken by the High Court of Madras (*z*).

Child Marriage Restraint Act, 1929, (XIX of 1929).—This Act restrains the solemnisation of marriages between children. The word "child" has been defined in the Act as a male under eighteen years of age and a female under fourteen years of age. It makes it penal for a male under the age of eighteen years to marry a girl under the age of fourteen years. It also prescribes punishment for parents and guardians who are parties to a marriage between a minor male and a girl under the age of fourteen years. But the Act does not affect the validity of such marriages. The material provisions of the Act are set out in Appendix X below.

(*t*) *Sundrabai* v. *Shivanarayana* (1908) 32 Bom. 81.

(*u*) *Purshotamdas* v. *Purshotamdas* (1897) 21 Bom. 23, 30-31; *Atma Ram* v. *Banku Mal* (1930) 11 Lah. 598, 125 I.C. 369, ('30) A.L. 561. See also *Khwaja Muhammad Khan* v. *Husaini Begam* (1910) 32 All. 410, 37 I.A. 152 [a Mahomedan case].

(*v*) *Mouji Lal* v. *Chandrabati* (1911) 38 Cal. 700, 706, 38 I.A. 122, 125, 11 I.C. 502. But see *Venkatacharyulu* v. *Rangacharyulu* (1891) 14 Mad. 316, 318.

(*w*) *Amirthammal* v. *Vallimayil Ammal* (1942) Mad. 807, 203 I.C. 648, ('42) A.M. 693.

(*x*) (1891) 14 Mad. 316, 320, *supra*.

(*y*) (1908) 32 Bom. 81, *supra*.

(*z*) *Gopalakrishnam* v. *Venkatarasa* (1914) 37 Mad. 273 [F.B.], 17 I.C. 308, ('14) A.M. 432, overruling *Govindavazulu* v. *Deverabhotla* (1904) 27 Mad. 206 [a case of Brahmans]; *Rameswara* v. *Veeracharlu* (1911) 34 Mad. 422, 8 I.C. 195 [a case of Sudras].

428. Forms of Marriage.—(*1*) The ancient Hindu law recognized eight forms of marriage, of which four were approved forms, and four unapproved. The only forms of marriage now recognized are— S. 428

(i) the *Brahma* form, which is one of the approved forms; and

(ii) the *Asura* form, which is one of the unapproved forms.

(*2*) Where the father or other guardian of the bride gives the bride in marriage without receiving any consideration from the bridegroom for giving the girl in marriage the marriage is called *Brahma*. But where he receives such consideration, which is technically called *sulka* or bride's price, the marriage is called *Asura*, even though it may have been performed according to the rites prescribed for the *Brahma* form. The test in each case is, whether any consideration was received by the father or other guardian for giving the girl in marriage. The mere giving of a present to the bride or to her mother as a token of compliment to her does not render it an *Asura* marriage (*a*).

(*3*) Hindus belonging to any class may now marry either in the *Brahma* form or the *Asura* form. Thus a Brahman may contract an *Asura* marriage, and a Sudra may contract a *Brahma* marriage (*b*).

The *Brahma* form is the only one now left of the four approved forms. It required that the bridegroom should be "a man learned in the *Veda*," and it was originally peculiar to *Brahmans*. But even a Sudra may now marry in that form. The *Asura* form is the only one now left of the four unapproved forms. What distinguishes the one form from the other is that in the *Brahma* form it is a *gift* of the girl pure and simple, in the *Asura* form it is a *sale* of the bride for pecuniary consideration. That consideration is called *sulka*. *Sulka* was originally regarded as the property of the bride's father. Though marriages by sale fell into disrepute, the custom of paying the *sulka* remained; but it was no longer regarded as the property of the bride's father; it came to be regarded as the bride's *stridhana*. Though *sulka* is now regarded as *stridhana*, it still preserves its original character in that it devolves in the first instance, unlike *stridhana* of other kinds, on the bride's mother and brothers [sec. 146].

Of the other three unapproved forms, only the *Gandharva* requires notice. In an Allahabad case it was remarked that the *Gandharva* form had become obsolete. In a Madras case it was said that the *Gandharva* form still prevailed in some parts of India (*c*).

(*a*) *Chunilal* v. *Surajram* (1909) 33 Bom. 433, 3 I.C. 765; *Authikesavulu* v. *Ramanujam* (1909) 32 Mad. 512, 3 I.C. 541; *Hira* v. *Hansji* (1913) 37 Bom. 295, 17 I.C. 949; *Govind* v. *Savitri* (1919) 43 Bom. 173, 177, 47 I.C. 883, ('18) A.B. 93; *Kaiasunatha Mudaliyar* v. *Parasakti Vadivanni* (1935) 58 Mad. 488, ('35) A.M. 740.

(*b*) *Bhaoni* v. *Maharaj Singh* (1881) 3 All. 738.

(*c*) *Brindavana* v. *Radhamani* (1889) 12 Mad. 72.

Ss. 428-433

It has been held in Patna that a minor girl is incompetent to contract a marriage in *Gandharva* form (*d*). Among Sudras a marriage in the *katar* form (in which the bride is given to the bridegroom with sword or dagger in place of the bridegroom) is not a valid marriage, in the absence of proof that the ordinary ceremonies of a Hindu marriage were performed (*e*).

429. Presumption as to form.—When there is a question as to whether a marriage was in the *Brahma* form or the *Asura* form, the Court will presume, even where the parties are Sudras, that it was in the *Brahma* form; in other words, that no consideration for the marriage passed from the bridegroom to the father or other guardian of the bride. But this presumption may be rebutted by showing that the marriage was in the *Asura* form (*f*).

Where a woman dies without leaving issue, if her marriage was in the *Brahma* form her *stridhana* devolves in one way, and if in *Asura* form, it devolves in another way (secs. 147, 151). Hence the importance of the distinction between the two forms of marriage. The essential ceremonies for these forms of marriage are the same as will be seen presently.

Cutchi Memons.—For the purposes of succession to the *stridhana* of a Cutchi Memon female, her marriage, though performed according to Mahomedan rites, is regarded as one in the approved form (*g*). But see the Shariat Act, 1937, and the commentaries thereon in Mulla's Mahomedan Law, 12th Ed., p. 3 *et seq.*

For presumption as to legality of marriage, see sec. 438.

430. No restriction as to number of wives.—A Hindu may marry any number of wives, although he has a wife or wives living (*h*).

431. Only one husband at a time.—A woman cannot marry another man while her husband is alive, except where her marriage has been dissolved by divorce [s. 441].

432. Remarriage of widows.—The remarriage of Hindu widows is now expressly legalized by the Hindu Widows Remarriage Act, 1856.

Forfeiture of property by remarriage.—See notes to sec. 43, No. 4 (widow), under the head "remarriage."

433. Who may give in marriage.—(*1*) The *Sastras* enjoin the marriage of a female before she arrives at puberty, and

(*d*) *Bamdeb Das* v. *Raja Brajsunder Deb* (1938) 17 Pat. 134.

(*e*) *Ramsaran Singh* v. *Mahabir Sewak Singh* (1934) 61 I.A. 106, 147 I.C. 667, ('34) A.PC. 74.

(*f*) *Mussumat Thakoor Deyhee* v. *Rai Baluk Ram* (1866) 11 M.I.A. 139; *Chunilal* v. *Surajram* (1909) 33 Bom. 433, 437, 3 I.C. 765; *Jagannath* v. *Narayan* (1910) 34 Bom. 553, 7 I.C. 459; *Authikesavulu* v. *Ramanujam* (1909) 32 Mad. 512, 3 I.C. 541; *Hira* v. *Hansji* (1913) 37 Bom. 295, 17 I.C. 949 [remarriage of divorced Koli woman]; *Kishan Dei* v. *Sheo Paltan* (1926) 48 All. 126, 90 I.C. 358, ('26) A.M. 1 [marriage in Karao form]; *Kamla Prasad* v. *Murli Manoher* (1934) 13 Pat. 550, 152 I.C. 446, ('34) A.P. 398.

(*g*) *Moosa* v. *Haji Abdul* (1906) 30 Bom. 197.

(*h*) *Virasvami* v. *Appasvami* (1863) 1 Mad. H.C. 375.

prescribe rules for guardianship in marriage. The following persons are qualified, in the order mentioned below, to give a girl in marriage :— **S. 433**

According to the Mitakshara school—

(1) the father ;
(2) the paternal grandfather ;
(3) the brother (*i*).
(4) other paternal relations of the girl in order of propinquity ;
(5) the mother.

According to the Bengal school.—The Bengal school places the maternal grandfather and maternal uncle before the mother. In other respects the rules are the same as under the Mitakshara.

(2) The marriage of a male minor is not prohibited, and his lawful guardian may consent to his marriage.

Mother.—Though the mother is postponed to the paternal male relations, it does not follow that she, who in the absence of the father, is the *legal guardian* of her daughter [sec. 518], is to have no voice at all *in the choice of a husband* for the daughter. The only reason why the mother is postponed is that she cannot perform the ceremony of giving the girl in marriage called *kanyadana*, and even when in default of paternal male relation she makes the *gift*, she has to employ some male to perform that ceremony (*j*). The Madras High Court has gone further and said that even if there be a paternal grandfather, the mother as the natural guardian of her daughter is entitled *to select* a husband for her (*k*). The Lahore High Court is inclined to the same view (*l*). A step-mother has no right to give her step-daughter in marriage, if there is a paternal grandmother (*m*).

Paternal relatives and maternal relatives.—So long as there are competent paternal relatives in existence, the maternal relatives of a girl have no authority to give her in marriage ; but where the paternal relatives refuse to act or have disqualified themselves from acting, the maternal relatives acquire authority to contract marriage on behalf of the girl (*n*).

Re-marriage of widows.—As to the consent necessary to the remarriage of *minor* widows, it is provided by sec. 7 of the Hindu Widows Remarriage Act, 1856, that if the widow remarrying is a *minor whose marriage has not been consummated*, she shall not remarry without the consent of her father, or, if she has no father, of her paternal grandfather, or, if she has no such grandfather, of her mother, or, failing all these, of her elder brother, or, failing also brothers, her next male relative. A marriage made in contravention of the above provisions, *e.g.*, a marriage of a widowed girl with the consent of her *mother-in-law* (*o*), may be declared void by the Court, but not after it has been consummated. In the case of a widow who is of *full age, or whose marriage has been consummated*, her own consent is sufficient to constitute her remarriage lawful and valid.

(*i*) *Nek Ram* v. *Emperor* ('35) A.A. 920.
(*j*) *Bai Ramkore* v. *Jamnadas* (1913) 37 Bom. 18, 17 I.C. 45.
(*k*) *Ranganaiki* v. *Ramanuja* (1912) 35 Mad. 728, 734, 11 I.C. 570.
(*l*) *Mst. Indi* v. *Ghania* (1920) 1 Lah. 146, 53 I.C. 783 ; *Mst. Jiwani* v. *Mula Ram* (1922) 3 Lah. 29, 67 I.C. 253, ('22) A L. 112
(*m*) *Ram Bunsee* v. *Soobh Koonwaree* (1867) 7 W. R. 321.
(*n*) *Kasturi* v. *Panna Lal* (1916) 38 All. 520, 36 I.C. 245, ('17) A.A. 451.
(*o*) *Sant Ram* v. *The Crown* (1930) 11 Lah. 178, 189, 124 I.C. 310, ('29) A. L. 713.

Ss. 433, 434

The Indian Majority Act, 1875.—Minority, according to the Mitakshara school terminates on completion of the sixteenth year; according to the Bengal school, on completion of the fifteenth year. The Indian Majority Act, 1875, does not apply to Hindus in matters of marriage, divorce and adoption.

434. Marriage without consent of guardian.—(*1*) The primary duty, and the correlative right, of giving a girl in marriage, rests with the father. This right is not lost merely because the father has been convicted of theft or any other offence not connected with domestic relations (*p*). But where the father has deserted his wife and daughter, the mother can give the daughter in marriage without the consent of the father (*q*). Even where the father is alive and otherwise capable of giving away his daughter, the Court will not declare a marriage invalid, merely because the daughter was given in marriage by the mother without his consent, provided the necessary ceremonies have been performed, and there has been no force or fraud (*r*). This rests on the principle that guardianship for the purpose of marriage is not so much a right as a duty, and the consent, therefore, of the guardian is not a condition precedent to the validity of the marriage (*s*). There is a difference of opinion among Hindu text-writers as to the correctness of this principle (*t*). Whatever the correct view may be, the rule established by the decisions is that a marriage which is duly solemnized, and is otherwise valid, is not rendered invalid, because it was brought about by misrepresentation to the guardian (*u*) or without the consent of the guardian for the purpose of marriage (*v*), or in contravention of an express order of the Court (*w*). But a marriage though performed with the necessary ceremonies, may be set aside by the Court, if it was brought about by force or fraud (*x*).

(*2*) The rule referred to in the preceding sub-section applies only where a marriage has been actually celebrated. But while there is only a contract for marriage, it is competent

(*p*) *Nanabhai* v. *Janardhan* (1888) 12 Bom. 110, 119.

(*q*) *Khushalchand* v. *Bai Mani* (1887) 11 Bom. 247.

(*r*) *Venkatacharyulu* v. *Rangacharyulu* (1891) 14 Mad. 316.

(*s*) (1887) 11 Bom. 247, *supra*.

(*t*) See Ghose's Hindu Law, 3rd ed., pp. 802-803; Banerji's Law of Marriage, 5th ed., pp. 55-56; G. Sarkar's Hindu Law, 7th ed., p. 165.

(*u*) *Khitesh Chandra Chakrabarti* v. *Emperor* (1937) 2 Cal. 221, 168 I.C. 708, ('37) A.C. 214.

(*v*) *Khushalchand* v. *Bai Mani* (1887) 11 Bom. 247; *Venkatacharyulu* v. *Rangacharyulu* (1891) 14 Mad. 316; *Mulchand* v. *Bhudhia* (1898) 22 Bom. 812; *Ghazi* v. *Sukru* (1897) 19 All. 515; *Brindabun* v. *Chundra* (1886) 12 Cal. 140; *Kasturi* v. *Chiranji Lal* (1913) 35 All. 265, 18 I.C. 927; *Gajja Nand* v. *The Crown* (1921) 2 Lah. 288, 64 I.C. 500, ('22) A. L. 139.

(*w*) *Bai Diwali* v. *Moti* (1898) 22 Bom. 509.

(*x*) (1891) 14 Mad. 316, *supra*; (1898) 22 Bom. 812, *supra*.

to a guardian to sue for an injunction to prevent the marriage of his ward to a person of whom he does not approve and the Court may grant an injunction subject to such terms as it may consider necessary to impose on the guardian for the benefit of the minor (*y*).

Factum valet quod fieri non debuit.—It is a doctrine of the Hindu law enunciated by the author of the Dayabhaga and recognised also by the Mitakshara school, that "a *fact* cannot be altered by a hundred texts." The "texts" referred to above are texts that are directory as distinguished from those that are mandatory. The meaning of the doctrine is that where a fact is accomplished, in other words, where an act is done and finally completed, though it may be in contravention of a hundred *directory* texts, the fact will stand, and the act will be deemed to be legal and binding. The maxim of the Roman Civil law corresponding to this doctrine is *factum valet quod fieri non debuit* which means that what *ought* not to be done is valid when done. It is otherwise where an act is done in contravention of texts which are in their nature *mandatory*. The texts which prescribe rules for the consent of guardians for the purpose of marriage have been held to be merely directory; hence a marriage once performed and solemnized, though it be without the consent of the guardian, has been held to be valid. It has similarly been held that the texts which prohibit the adoption of an only son, and those which enjoin the adoption of a relation in preference to a stranger, are only directory; therefore, the adoption of an only son, or a stranger in preference to a relation, if completed, is not invalid. In cases such as the above, where the texts are merely directory, the principle of *factum valet* applies, and the act done is valid and binding (*z*). But the texts relating to the capacity to give, the capacity to take, and the capacity to be the subject of adoption are *mandatory*. Hence the principle of *factum valet* is ineffectual in the case of an adoption in contravention of the provisions of those texts (*a*).

435. Identity of caste or of sub-caste.—(*1*) A marriage between persons belonging to different sub-divisions of the same caste is not invalid (*b*).

A marriage between a Grihasth Goshain and a woman of another caste initiated as a goshain is valid (*c*).

(*2*) For the purposes of marriage, converts to Hinduism are regarded as *Sudras*. Therefore, the marriage of a Hindu

(*y*) *Kashi, in the matter of* (1882) 8 Cal. 266; *Shridhar* v. *Hiralal* (1888) 12 Bom. 480; *Nanabhai* v. *Janardhan* (1888) 12 Bom. 110; *Kasturi* v. *Panna Lal* (1916) 38 All. 520, 36 I.C. 245, ('17) A.A. 451 [damages for wrongful injunction].

(*z*) *Wooma Daee* v. *Gokoolanund* (1878) 3 Cal. 587, 5 I.A. 40; *Balusu* v. *Balusu* (1899) 22 Mad. 398, 26 I. A. 113; (1898) 22 Bom. 812, *supra*.

(*a*) *Lakshmappa* v. *Ramava* (1875) 12 Bom. H.C. 364, 398 (1899) 22 Mad. 398, 26 I.A. 113, 144, *supra*; *Ganga* v. *Lekhraj* (1887) 9 All. 253, 296-297; *Gopal* v. *Hanmant* (1879) 3 Bom. 273, 293-294; *Padajirav* v. *Ramrav* (1889) 13 Bom. 160, 167 (1898) 22 Bom. 812, *supra*.

(*b*) Marriage between persons belonging to Sudra sub-castes; (1869) 13 M.I.A. 141, 158-159, *supra*; *Ramamani* v. *Kulanthai* (1871) 14 M.I.A. 346; *Upoma* v. *Bholaram* (1888) 15 Cal. 708; *Fakirgauda* v. *Gangi* (1897) 22 Bom. 277; *Biswanath* v. *Shorashibala* (1921) 48 Cal. 926, 66 I.C. 590, ('21) A.C. 48; *Sohan Singh* v. *Kabla Singh* (1929) 10 Lah. 372, 112 I.C. 593, ('28) A.L. 706 [Jat male and Maskadi female]; *Har Prasad* v. *Kewal* (1925) 47 All. 169, 83 I C. 163, ('25) A.A. 26 [Bisa husband and Dasa wife]; *Gopi Krishna Kasaundhan* v. *Mt. Jaggo* (1936) 63 I.A. 295, 58 All. 397, 38 Bom. L.R. 751, 162 I.C. 993, ('36) A.PC. 198; *Khiteesh Chandra Chakrabarti* v. *Emperor* (1937) 2 Cal. 221, 168 I.C. 708, ('37) A.C. 214. (A case of Brahmin sub-castes.)

(*c*) *Kaura Devi* v. *Indra Devi* (1943) All. 703, 210 I.C. 464, ('43) A.A. 310.

S. 435 who is a *Sudra* by caste with a Christian woman who has become a convert to Hinduism before the marriage, is treated as a marriage between two *Sudras*, and it is valid if it otherwise complies with the requirements of the Hindu law (*d*).

The second marriage of a person who was reconverted from Christianity to Hinduism during the life-time of his first wife is valid (*e*).

(3) *As to identity of caste*—The ancient texts prohibited prathiloma marriages, *i.e.*, between males of lower caste and females of higher caste. Accordingly such marriages have been held by courts to be invalid (*f*). But Anuloma marriages were permitted and recognised by the texts (*g*). Accordingly the Bombay High Court held that a marriage between a Vaisya male and a Sudra female (*h*), or a Brahman male and a Sudra female is valid. In the latter case it was held that the son born of such a marriage is legitimate and is entitled to inherit a one-tenth share in the estate of his uncle, the other nine-tenths going to the reversioner of the uncle (*i*). The High Court of Calcutta has held that a marriage between a Brahman and a Sudra woman both of whom are Jati Vaishnavas is valid (*j*).

Even Anuloma marriages have been held to be invalid in Allahabad and Madras (*k*). It is submitted that these cases are incorrectly decided and require reconsideration. Where an action prohibited by law is practised by the people in a number of instances this may create a positive custom; but where an action permitted by law has fallen into disuse for a long time this cannot create a negative custom. The act still remains valid if it is taken up after long disuse.

Marriage of illegitimate persons.—In the case of the marriage of an illegitimate person who, strictly speaking, belongs to no caste, he or she must be treated as belonging to the caste the members of which have recognised him or her as a caste fellow (*l*).

Mixed marriages.—The Hindu law lays down certain rules for determining the caste of offspring of unions between parents belonging to different castes, and gives separate names to the mixed castes to which such offspring belong. When intermarriages were permitted by ancient Hindu law, children born of mixed marriages were termed *Anuloma*,

(*d*) *Muthusami* v. *Masilamani* (1910) 33 Mad. 342, 5 I.C. 42, where the earlier decisions are reviewed.

(*e*) *Goona Durgaprasad Rao* alias *Pedda Babu* v. *Guna Sundarasan Swami and Ors.* (1940) Mad. 653, 190 I.C. 868, ('40) A.M. 513.

(*f*) *Lakshmi* v. *Kalian Sing* (1900) 2 Bom. L.R. 128 [Kshatriya male and Brahman female]; *Bai Kashi* v. *Jamnadas* (1912) 14 Bom. L.R. 547, 16 I.C. 133 [Sudra male and Brahman female]; *Munni Lal* v. *Shiama* (1926) 48 All. 670, 97 I.C. 347, ('26) A.A. 656 [Sudra male and Vaishya female].

(*g*) Manu, Yajnavalkya, Sankha, Gouthama, Vyasa, and Vishnu and Mitakshara.

(*h*) *Bai Gulab* v. *Jiwanlal* (1922) 46 Bom. 871, 65 I.C. 602, ('22) A.B. 32.

(*i*) *Natha* v. *Mehta Chotalal* (1931) 55 Bom. 1, 130 I.C. 17, ('31) A.B. 89.

(*j*) *Nalinaksha* v. *Rajani* (1931) 58 Cal. 1392, 134 I.C. 1272, ('31) A.C. 741.

(*k*) *Padam Kumari* v. *Suraj Kumari* (1906) 28 All. 458 [Brahman male and Kshatriya female]; *Swayampakula Subbaramayya* v. *Swayampakula Venkatasubbamma* (1941) Mad. 989, ('41) A.M. 513.

(*l*) *In the matter of Ramkumari* (1891) 18 Cal. 264; *Emperor* v. *Madan Gopal* (1912) 34 All. 589, 16 I.C. 513.

jas, that is, offspring of *Anuloma* marriage, and their caste was neither that of their father nor that of their mother. They belonged to an intermediate caste higher than that of their mother, and lower than that of their father. Thus a son begotten by a Brahman upon a Kshatriya wife is a Murdhavasikta, upon a Vaisya wife is an Ambashta, and upon a Sudra wife is Nishada or Parasava. A son begotten by a Kshatriya on a Vaisya wife is a Mahishya, and upon a Sudra wife an Ugra. A son born of a Vaisya by a Sudra wife is a Karana. It has accordingly been held that the illegitimate son of a Kshatriya by a Sudra woman is not a Sudra, but of a higher caste called Ugra (*m*). **Ss. 435, 436**

This section does not apply to Arya Samajists (Act XIX of 1937).

The Indian Christian Marriage Act, 1872.—As to marriages between Hindus and Christians, see the Indian Christian Marriage Act, 1872, and the under-mentioned case (*n*).

436. Prohibited degrees of relationship.—No marriage is valid if it is made between persons related to each other within the prohibited degrees, unless such marriage is sanctioned by custom (*o*).

A karewa marriage between a father-in-law and daughter-in-law among the Jats (who are presumed to be Sudras) is invalid and cannot be validated by custom (*p*).

The following are the rules regarding prohibited degrees :—

(1) A man cannot marry a girl of the same *gotra* or *pravara*, the theory being that his father and the girl's father are both descendants of a common ancestor in the male line. It has been held in Allahabad that where a widow has remarried a person belonging to her father's gotra the marriage is not invalid as she has not reverted to her father's gotra by her husband's death and her issue is legitimate (*q*). This rule does not apply to *Sudras*, the reason given being that *Sudras* have no *gotra* of their own.

This rule is called exogamy. Its effect is that a man cannot marry the daughter of an agnate. The next rule provides for the case where the girl is a cognate relation of the boy, that is, related to him through a female.

(2) A man cannot marry a girl who is his *sapinda*. This rule is accepted both by the Bengal and the Mitakshara schools. But there is a difference of opinion between the two schools as to who are *sapindas* for marriage.

(*m*) *Brindavana* v. *Radhamani* (1889) 12 Mad. 72, 78-80; *Jwala Singh* v. *Sardar* (1919) 41 All. 629, 15 I.C. 216, ('19) A.A. 317.
(*n*) *Chetti* v. *Chetti* (1909) Probate 67.
(*o*) Banerjee's "Law of Marriage," 5th ed., pp. 70-71, 269-274, 285, 289.
(*p*) *Jagnohar Singh* v. *Sadhu Ram* (1934) 15 Lah. 688, 149 I.C. 24, ('34) A. L. 283.
(*q*) *Radha Nath Mukerji* v. *Shaktipada Mukerji* (1936) 58 All. 1053, 164 I.C. 595, ('36) A.A. 624.

S. 436 *Bengal school.*—According to the Dayabhaga law, a man cannot marry a girl—

(a) if she is within the 7th degree in descent from his father or from one of his father's six ancestors in the male line;

(b) if she is within the 5th degree in descent from his maternal grandfather or from one of his maternal grandfather's four ancestors in the male line;

(c) if she is within the 7th degree in descent from his father's three technical *bandhus*, or from one of their six ancestors through whom the girl is related to him [sec. 46, sub-sec. (*4*), Pitri Bandhus];

(d) if she is within the 5th degree in descent from his mother's three technical *bandhus* or from one of their four ancestors through whom the girl is related to him [sec. 46, sub-sec. (*4*), Matri Bandhus](*r*).

Exception.—A girl, though related within the degrees mentioned above, may be taken in marriage if she is removed by three *gotras* from him (*s*).

Mitakshara school.—According to the Mitakshara law, a man cannot marry a girl if their common ancestor, being traced through his or her father, is not beyond the seventh in the line of ascent from him or her or, if their common ancestor, being traced through their mothers, is not beyond the fifth in the line of ascent from him or her (*t*). In other words, descendants up to the seventh degree through males or females of paternal ancestors up to the seventh degree, and descendants up to the fifth degree of maternal ancestors up to the fifth degree, are excluded as being *sapindas* (*u*).

In the Madras Presidency the rules restricting marriages between cognate sapindas are practically obsolete, *e.g.*, the marriage of cognate first cousins (children of brother and sister) is common among Telugus. It was recognised by Baudhayana. The marriage of a male to his sister's daughter is common among Reddis. The marriage of cognate sapindas beyond these limits has always been regarded as lawful and as not prohibited in the whole of Southern India—except between cousins who are children of two sisters.

(*r*) *Bijan Majumdar* v. *Ranjit Lal Sen Gupta* (1942) 2 Cal. 445, 202 I.C. 33, ('42) A.C. 458.

(*s*) Banerjee's "Law of Marriage," 5th ed., pp. 69-70.

(*t*) *Ramchandra* v. *Vinayak* (1914) 41 I.A. 290, 300-311, 42 Cal. 384, 417-419, 26 I.C. 290, ('14) A.PC. 1.

(*u*) Bhattacharya's "Hindu Law," 2nd ed., p. 90.

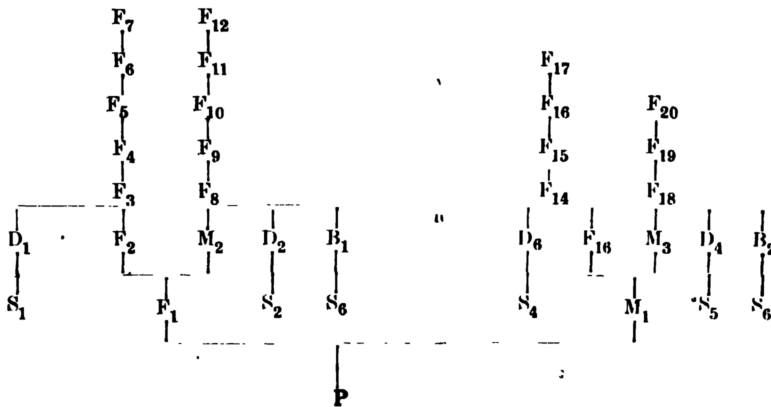
(3) In computing the degrees for the purposes of sub-sec. (2), the common ancestor and the person in question are each to be counted as one degree. S. 436

(4) Relationship by marriage is not by itself an impediment to marriage. Thus a man may marry the daughter of his wife's sister (v).

Sagotra.—Two persons are *sagotra*, that is, of the same *gotra* or family, if both of them are descended in the male line from the *Rishi* or sage after whose name the *gotra* is called, however distant either of them may be from the common ancestor.

Samana-pravara.—Two persons are *Samana-pravara*, that is, of the same *pravara*, if they are descendants in the male line of the three paternal ancestors of the founder of a *gotra* (w).

Sub-sec. (2).—The following diagram (x) will enable the reader to understand the four rules applied by the Dayabhaga school to determine *sapindaship* :—



In the above diagram *P* is the bridegroom ; F_1 is his father ; M_1 is his mother ; M_2 is his father's mother ; M_3 is his mother's mother.

F_1 to F_7 are his 7 paternal ancestors in the male line. F_8 to F_{12} are his father's 5 maternal ancestors in the male line. F_{13} to F_{17} are his mother's 5 paternal ancestors in the male line. F_{18} to F_{20} are his mother's 3 maternal ancestors in the male line. S_1, S_2 and S_3 are his father's *bandhus*. S_4, S_5 and S_6 are his mother's *bandhus*.

According to sub-rule (a), *P* cannot marry a girl within the 7th degree in descent from any one of his 7 paternal ancestors F_1 to F_7.

According to sub-rule (b), *P* cannot marry a girl within the 5th degree in descent from any one of his mother's 5 paternal ancestors F_{13} to F_{17}. (F_{13} is *P*'s maternal grandfather.)

(v) *Raghavendra* v. *Jayaram* (1897) 20 Mad. 283 ; *Ramakrishna* v. *Subbamma* (1920) 43 Mad. 830, 59 I.C. 268, ('20) A.M. 715.

(w) G. Sarkar's "Hindu Law," 7th ed. p. 89.

(x) The diagram is reproduced from G. Sarkar's "Hindu Law," 7th ed., p. 140.

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For the purposes of sub-rule (c), the father's *bandhus* are restricted to the three relations expressly mentioned as such in the Mitakshara, namely :—

(λ) Father's [F_1] father's [F_2] sister's [D_1] son, that is, S_1 ;
(β) „ „ mother's [M_2] sister's [D_2] son, that is, S_2 ;
(γ) „ „ mother's [M_2] brother's [B_1] son, that is, S_3.

According to sub-rule (c), *P* cannot marry a girl within the 7th degree in descent from—

(*i*) S_1, S_2 or S_3 ;
[(*ii*) F_3 to F_7, ancestors of S_1, already included in sub-rule (a)] ;
(*iii*) any one of the 5 persons F_8 to F_{12}, ancestors of S_2 and S_3 ;
(*iv*) B_1, father of S_3.

For the purposes of sub-rule (d), the mother's *bandhus* are restricted to the three relations expressly mentioned as such in the Mitakshara, namely :—

(λ) Mother's [M_1] father's [F_{13}] sister's [D_3] son, that is, S_4 ;
(β) „ „ mother's [M_3] sister's [D_4] son, that is, S_5 ;
(γ) „ „ mother's [M_3] brother's [B_2] son, that is, S_6 .

According to sub-rule (d), *P* cannot marry a girl within the 5th degree in descent from—

(*i*) S_4, S_5 or S_6 ;
[(*ii*) F_{14} to F_{17}, ancestors of S_4, already included in sub-rule (b)] ;
(*iii*) any one of the 3 persons F_{18} to F_{20}, ancestors of S_5 and S_6 ; and
(*iv*) B_2, father of S_6

The reader will find the above rules in Dr. Banerjee's "Law of Marriage". The rules relating to the Bengal school are set forth in Raghunandana's *Udvahatattva*, a work of authority in Bengal, and are repeated by Kamalakara Bhatta in his *Nirnayasindhu*, a work of authority in the Benares school. The Bengal rules are in accordance with the interpretation put by Raghunandana upon the text of Manu, being text No. 2 cited at the commencement of this Chapter.

There is no difference between sapinda-relationship in respect of marriage and that in respect of inheritance (*y*).

437. Marriage ceremonies.—(*1*) There are two ceremonies essential to the validity of a marriage, whether the marriage be in the Brahma form or the Asura form, namely—

(1) invocation before the sacred fire, and
(2) *saptapadi*, that is, the taking of *seven* steps by the bridegroom and the bride jointly before the sacred fire.

The marriage becomes completed when the seventh step is taken ; till then it is imperfect and revocable (*z*). Consummation is not necessary to make a marriage complete and binding (*a*).

(*y*) *Babu Lal* v. *Nanku Ram* (1895) 22 Cal. 339 ; *Ramchandra* v. *Vinayak* (1914) 41 I A. 290, 309, 311, 42 Cal. 384, 417-419, 25 I.C. 290, ('14) A.PC. 1.

(*z*) *Chunilal* v. *Surajram* (1909) 33 Bom. 433, 437-438, 3 I.C. 765 ; *Authikesavalu* v *Ramanujam* (1909) 32 Mad. 512, 519-520, 3 I.C. 541 ; *Brindabun* v. *Chundra* (1886) 12 Cal. 140, 143.

(*a*) *Adm.-Gen. of Madras* v. *Anandachari* (1886) 9 Mad. 466, 470 ; *Dadaji* v. *Rukmabai* (1886) 10 Bom. 301, 311 ; *Emperor* v. *Munchi Ram* (1936) 59 All. 402, 158 I.C. 1007, ('36) A.A. 11.

(2) A marriage may be completed by the performance of ceremonies other than those referred to in sub-section (1), where it is allowed by the custom of the caste to which the parties belong (b). **Ss. 437-439**

Marriage of widows.—According to the Hindu law, no religious ceremonies are necessary in the case of marriage of *widows*. See the Hindu Widows' Remarriage Act, 1856, s. 6.

Betrothal.—Betrothal precedes marriage; but unlike marriage it is revocable, so that a girl betrothed to one person may be validly given in marriage to another person though in such a case a suit may be brought for damages against the father or other guardian of the girl who brought about the contract of marriage. Betrothal is no more than a *promise* to marry. In the case of minors, the promise is given by the father or other legal guardian. Where there is a breach of the promise, the appropriate remedy is not specific performance, but damages (c). When the plaintiff bridegroom dies pending a suit for damages, his legal representative can only recover the out of pocket expenses incurred during betrothal (d).

438. Presumption as to legality of marriage.—Where it is proved that a marriage was performed in fact, the Court will presume that it is valid in law (e), and that the necessary ceremonies have been performed (f). A Hindu marriage is recognised as a valid marriage in English law (g).

Presumption as to marriage and legitimacy.—There is an extremely strong presumption in favour of the validity of a marriage and the legitimacy of its offspring if from the time of the alleged marriage the parties are recognized by all persons concerned as man and wife and are so described in important documents and on important occasions. The like presumption applies to the question whether the formal requisites of a valid marriage ceremony were satisfied (h). Similarly the fact that a woman was living under the control and protection of a man who generally lived with her and acknowledged her children raises a strong presumption that she is the wife of that man. But this presumption may be rebutted by proof of facts showing that no marriage could have taken place (i).

439. Special Marriage Act, 1872.—It is now provided by the Special Marriage Act, 1872, as amended by the Special Marriage (Amendment) Act, 1923, that marriages may be celebrated before a Registrar between persons each of whom professes one or other of the following religions, that is to say, the Hindu, Buddhist, Sikh or Jaina religion.

(b) *Kally Churn* v. *Dukhee* (1880) 5 Cal. 692; *Hurry Churn* v. *Nimai* (1884) 10 Cal. 138, *Rampiyar* v. *Deva Rama* (1923) 1 Rang. 129, 76 I.C. 475, ('23) A. R. 202.

(c) *Purshotamdas* v. *Purshotamdas* (1897) 21 Bom. 23; *Rambhat* v. *Timmayya* (1892) 16 Bom. 673 [suit for restoration of presents], *Jekisondas* v. *Ranchoddas* (1917) 41 Bom. 137, 38 I.C. 588, ('16) A. B. 51; *Khimji* v. *Narsi* (1915) 39 Bom. 682, 28 I.C. 408, ('15) A. B. 300 [procuring breach of promise of marriage].

(d) *Balubhai* v. *Nanabhai* (1920) 44 Bom. 446, 55 I.C. 624, ('20) A.B. 225.

(e) *Inderun* v. *Ramaswamy* (1869) 13 M.I.A. 141, 158; *Fakirgauda* v. *Gangi* (1898) 22 Bom. 277, 279

(f) *Mouji Lal* v. *Chandrabati* (1911) 38 Cal 700, 38 I.A. 122, 11 I.C. 502, *Brindabun* v. *Chundra* (1886) 12 Cal. 140 *Bai Diwli* v. *Moti* (1898) 22 Bom. 509, *Administrator-General of Madras* v. *Anandachari* (1886) 9 Mad. 466; *Appibai* v. *Khimji Cooverji* (1936) 60 Bom. 455, 38 Bom. L.R. 77, 162 I.C. 188, ('36) A. B. 138.

(g) *Srinivasan* v. *Srinivasan* 73 Law Times 102.

(h) (1911) 38 Cal 700, 38 I.A. 122, 11 I.C. 502, *supra*.

(i) *Chellammal* v. *Ranganatham* (1911) 34 Mad. 277, 12 I.C. 247.

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The marriage under the Special Marriage Act, 1872, of any member of an undivided family, shall be deemed to effect his severance from such family. Further, a person professing any of the above religions and marrying under the Special Marriage Act, 1872, shall have the same rights and be subject to the same disabilities in regard to any right of succession to any property, as a person to whom the Caste Disabilities Removal Act, 1850, applies. Also the succession to the property of any such person, and to the property of the issue of such marriage, shall be regulated by the provisions of the Indian Succession Act, 1925. No such person shall have any right of adoption, but his father shall, if he has no other son living have the right to adopt another person as a son under the law to which he is subject. See the Special Marriage Act, 1872, ss. 22-26.

Sec. 24 of the Act introduced by the Amending Act of 1923, is not retrospective (*j*) under this Act.

A marriage between a Hindu and a person who is not a Hindu, Buddhist, Sikh or Jain is a nulity (*k*).

440. Marriage expenses.—In the case of a joint family governed by the Mitakshara law, the joint family property is liable, while the family is still joint, for the legitimate marriage expenses of *male* members of the family (*l*), and also of the *daughters* of male members of the family (*m*). The decision in *Subbayya* v. *Anantha* 53 Mad. 84 (p. 376 *supra*) implies that a father in possession of a joint family property is under a legal obligation to get his daughter married. It follows that if a father so in possession neglects his duty, the mother may perform it and recover the expenses from her husband. The decision in *Sundari Ammal* v. *Subrahmania Ayyar* 26 Mad. 505 requires reconsideration.

The texts enjoin the payment of expenses of *sanskaras* or sacraments out of the family property. Marriage is a *sanskara*, and its expenses, therefore, are to be provided for out of the joint family property. A debt contracted for the marriage of a coparcener or the daughter of a deceased coparcener in a joint Hindu family is a debt contracted for a family purpose, and therefore, for the benefit of the family. See ss. 243 and 427.

As to expenses of marriage after the institution of a suit for partition, see s. 304(2). As to the power of a widow to provide for the marriage expenses of her daughter out of her husband's estate, see s. 181B (iv).

441. Divorce.—(*1*) Divorce is not known to the general Hindu law. The reason is that a marriage, from the Hindu point of view, creates an indissoluble tie between the husband

(*j*) *Thakur Bai* v. *Attarar* (1935) 58 Mad. 1004, 157 I.C. 77, ('35) A.M. 653.

(*k*) *Ratan Behari* v. *Margaretha* (1939) 1 Cal. 201.

(*l*) *Sundrabai* v. *Shirnarayana* (1908) 32 Bom. 81; *Bhagirathi* v. *Jokhu Ram* (1910) 32 All. 575, 6 I.C. 455; *Gopalkrishnam* v. *Venkatanarasa* (1914) 37 Mad. 273, 17 I.C. 308, ('14) A.M. 432 [F.B.], overruling *Govindrazulu* v. *Devarabholla* (1904) 27 Mad. 206; *Kameswara* v. *Veeracharlu* (1911) 34 Mad. 422, [illegible] I.C. 195: *Debi Lal* v. *Nand Kishore* (1922) 1 Pat. 266, 65 I.C. 315, ('22) A.P. 22.

(*m*) *Vaikuntam* v. *Kallapiram* (1900) 23 Mad. 512; *Vaikuntam* v. *Kallipiram* (1903) 26 Mad. 497; *Ranganaiki* v. *Ramanuja* (1912) 35 Mad. 728, 11 I.C. 570; *Srinivasa* v. *Thiruvengadathaiyangar* (1915) 38 Mad. 556, 23 I.C. 264, ('14) A.M. 226 [unmarried sisters].

and the wife. Neither party, therefore, to a marriage can divorce the other unless divorce is allowed by custom (*n*). **S. 441**

(2) Change of religion or loss of caste does not operate as a dissolution of marriage, nor does the adultery of either party, nor even the fact that the wife has deserted her husband and become a prostitute (*o*).

(3) As to change of religion, it is now provided by the Native Converts' Marriage Dissolution Act, 1866, that where a Hindu becomes a convert to Christianity, *and* in consequence of such conversion, the husband or wife of the convert *deserts* or *repudiates* the convert, the Court may, on a petition presented by the convert, pass a *decree* dissolving the marriage, and the parties may *then* marry again as if the prior marriage had been dissolved by death. Conversion does not operate *per se* as a dissolution of marriage (*p*).

Divorce by custom.—It has been held in Bombay that a caste custom which permits a woman to desert her husband at her pleasure and marry again without his consent is void for immorality (*q*). And it has been doubted by the same Court whether the custom would be valid even if it allowed her to marry with his consent (*r*). The Madras High Court has held that a custom which permits a divorce by mutual agreement is not void for immorality (*s*). A custom granting divorce in the Pakhali community with the consent of the husband is valid (*t*).

It has been held in Bombay that a custom which permits a dissolution of the marriage tie by either husband or wife against the wish of the other, the sole condition attached being the payment of a sum of money fixed by the caste, is void as being opposed to public policy (*u*). Nor can a marriage be dissolved by a decision of the caste Panch (*v*).

The Native Converts' Marriage Dissolution Act, 1866.—This Act provides *inter alia* for dissolution of a Hindu marriage where one of the parties to the marriage changes his religion for Christianity and the other remains a Hindu. In such a case if the party who remains a Hindu deserts or repudiates the convert for the space of six continuous months in consequence of the latter's change of religion, the convert may present a petition to the Court praying that the other party may be ordered to live and cohabit with the petitioner or that the marriage may be dissolved. If at the hearing of the petition the respondent refuses to cohabit with the petitioner, and the Judge is satisfied that the ground for such refusal is the petitioner's change of religion, he shall adjourn the case for a year. If at the expiration of such adjournment, the respondent still refuses

(*n*) *Kudomee* v. *Joteeram* (1878) 3 Cal. 305; *Sankaralingam* v. *Subban* (1894) 17 Mad. 479.

(*o*) *Government of Bombay* v. *Ganga* (1880) 4 Bom. 330; *Admn. General of Madras* v. *Anandachari* (1886) 9 Mad. 466; *Ram Kumari, In the matter of* (1891) 18 Cal. 264; *Subbaraya* v. *Ramasami* (1900) 23 Mad. 171, 177; *Narain* v. *Tirlok* (1907) 29 All. 4; *Pakkiam* v. *Chelliah Pillai* (1923) 46 Mad. 839, 75 I.C. 17, ('24) A.M. 18 [F.B.]; *Gopal Krishna Kasandhan* v. *Mst. Jaggo* (1936) 63 I.A. 295, 58 All. 397, 38 Bom. L. R. 751, 162 I.C. 993, *Banarsi Das* V. *Sumat Prasad* (1936) 58 All 1019, 164 I.C. 1047, ('36) A.A. 641.

(*p*) *Gobardhan* V. *Jasadamoni* (1891) 18 Cal. 252.

(*q*) *Narayan* v. *Laving* (1878) 2 Bom. 140.

(*r*) *Khemkor* v. *Umiashankar* (1873) 10 Bom. H.C. 381.

(*s*) *Sankaralingam* v. *Subban* (1894) 17 Mad. 479

(*t*) *Jina Magan* v. *Bai Jethi* (1941) Bom 535, 195 I.C. 841, ('41) A.B. 208.

(*u*) *Keshav* v. *Bai Gandi* (1915) 39 Bom. 538, 29 I.C. 952, ('15) A.B. 107.

(*v*) *Emperor* v. *Bai Ganga* (1917) 19 Bom. L. R. 56, 39 I.C. 308, ('16) A.B. 97.

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to cohabit with the petitioner, the Judge shall pass a decree declaring that the marriage between the parties has been dissolved. When any such decree has been passed, it shall be lawful for the respective parties to marry again as if the prior marriage had been dissolved by death, and the issue of any such re-marriage shall be legitimate, any Native law to the contrary notwithstanding.

The Indian Divorce Act, 1869.- This Act provides *inter alia* for dissolution of marriage, but it applies only to cases where "the petitioner or respondent professes the Christian religion" (s. 2 of the Act). Sec. 7 of the Act provides that the Court shall act and give relief on principles of the English Divorce Courts. There is a conflict of opinion whether the Indian Divorce Act, 1869, applies only to monogamous marriages such as a Christian marriage or also to polygamous marriage such as a Hindu marriage where one of the parties, being the petitioner, changes his religion for Christianity after the marriage. *A* and his wife *B*, both Hindus, marry according to the rites of Hindu law. *A* and *B* subsequently become Christians. *A* then applies to the Court for the dissolution of the marriage on the ground that his wife has, since the solemnization of the marriage, been guilty of adultery (s. 10 of the Act). Is *A* entitled to relief under the Act ? It has been held by the Calcutta High Court that he is, the ground of the decision being that *A* professed the Christian religion at the time of presenting the petition and that fact was sufficient to give jurisdiction to the Court, under the Act, though the marriage was a Hindu marriage (*w*). On the other hand, it has been held by the Madras High Court, that having regard to s. 7, the Act applies to monogamous marriages only, and that the Court has no jurisdiction to entertain *A*'s petition under the Act (*x*).

442. Marital duties.- (*1*) The wife is bound to live with her husband and to submit herself to his authority. An agreement enabling the wife to avoid a marriage or to live separate from her husband if he leaves the village in which his wife, and her parents reside, or if he marries another wife, is void. Such an agreement is against public policy and contrary to the spirit of the Hindu law. An agreement of this kind is no answer to a suit for restitution of conjugal rights by a husband against his wife (*y*).

(*2*) The husband is bound to live with his wife and to maintain her.

443. Guardianship of wife.—(*1*) The husband is the lawful guardian of his minor wife (*z*) and is entitled to require her to live with him, however young she may be, unless there is a custom enabling the wife to live with her parents until she has arrived at puberty (*a*).

(*2*) After the husband's death, the guardianship of the wife, if she is a minor, devolves on the husband's relations in preference to her paternal relations (*b*).

(*w*) *Thapita* v. *Thapita* (1894) 17 Mad. 235; *Gobardhan* v. *Jasadamoni* (1891) 18 Cal. 252.

(*x*) (1894) 17 Mad. 235, *supra*. See also *Periyanayakam* v. *Pottukanni* (1891) 14 Mad. 382.

(*y*) *Sitaram* v. *Aheeree* (1873) 11 Beng. L. R. 129; *Tekait* v. *Basanta* (1901) 28 Cal. 751.

(*z*) *Dhuronidhur, in the matter of* (1890) 17 Cal. 298.

(*a*) *Arumuga* v. *Viraraghava* (1901) 24 Mad. 255.

(*b*) *Khudiram* v. *Bonwarilal* (1889) 16 Cal. 584.

The infancy of the wife is no ground for depriving the husband of his right to demand that his wife shall reside in the same house as himself though it might be right in the case of a very young girl to require the husband to show that she would be placed by him under the immediate care of some female member of his family (c). See the Guardians and Wards Act, 1890, sec. 19. **Ss. 443, 444**

444. Restitution of conjugal rights.—(*1*) Either party to a marriage may sue the other for restitution of conjugal rights (*d*). The Court may refuse to pass a decree for restitution of conjugal rights against the wife, if the husband is suffering from a loathsome disease, such as leprosy or syphilis (*e*), or if he keeps a concubine in the house, or is guilty of cruelty in a degree rendering it unsafe for the wife to return to her husband's dominion (*f*), or if he adopts another religion (*g*). But the mere fact of the husband marrying a second wife (*h*), or mere infidelity on the part of the husband (*i*), or the fact that the wife is a minor (*j*) [s.443], is not by itself sufficient to disentitle the husband from claiming restitution of conjugal rights.

(*2*) In a suit for restitution of conjugal rights by a Hindu husband, the husband is not necessarily entitled to a decree in the absence of a plea of cruelty by the wife. Where the wife has pleaded that she was deserted or neglected (*k*) by her husband and that the suit is not *bona fide*, she should be allowed to lead evidence so that the Court may be in a position to judge whether the relief sought for by the husband should be granted or not, and if so on what conditions, if any (*l*).

In a suit by the husband for restitution of conjugal rights the cause of action arises where the husband lives (*m*).

It has been held by the High Court of Calcutta (*n*), and following it, by the High Court of Rangoon (*o*), that the presumption that the requisite ceremonies have been performed [s. 438] applies only to cases involving questions of inheritance so as to avoid illegitimacy, and that no such presumption arises in a suit for restitution of, conjugal rights. In such a suit, where the validity of the marriage is disputed, the Court must find specifically whether the requisite ceremonies were performed.

(*c*) *Kaleeram* v. *Musammut Gendhenee* (1875) 23 W. R. 178; *Surjyamoni* v. *Kali Kanta* (1901) 28 Cal. 37; *Narnitlal* v. *Purshotam* (1926) 50 Bom. 268, 94 I.C. 11, ('26) A.B. 238.

(*d*) *Tekait* v. *Basanta* (1901) 28 Cal. 751; *Dadaji* v. *Rukmabai* (1886) 10 Bom. 301.

(*e*) *Bai Premkuvar* v. *Bhika* (1868) 5 Bom. H.C. A.C. 209.

(*f*) *Dular Koer* v. *Dwarka Nath* (1905) 34 Cal. 971; *Yamunabai* v. *Narayan* (1876) 1 Bom. 164.

(*g*) *Paigi* v. *Sheonarain* (1886) 8 All. 78.

(*h*) *Motilal* v. *Bai Chanchal* (1902) 4 Bom. L.R. 107.

(*i*) *Binda* v. *Kaunsilia* (1891) 13 All. 126, 164.

(*j*) (1901) 28 Cal. 37, *supra*; (1886) 10 Bom. 301, *supra*.

(*k*) *Ud. Singh* v. *Mst. Daulat Kaur* (1935) 16 Lah. 892, 158 I.C. 223, ('35) A L 386.

(*l*) *Bai Jivi* v. *Narsingh* (1927) 51 Bom. 329, 101 I.C. 403, ('27) A B. 264.

(*m*) *Venugopal Naidu* v. *Lakshmi Ammal* (1936) 59 Mad. 392, 161 I.C. 485, ('36) A.M. 288.

(*n*) *Suriyamoni* v. *Kalikanta* (1901) 28 Cal. 37, 50.

(*o*) *Rampyar* v. *Deva Rama* (1923) 1 Rang. 129, 76 I.C. 475, ('23) A. R. 202.

CHAPTER XXIII.

ADOPTION

1. "There is no heavenly region for a sonless man."—***Vasistha.***

2. "He whom his father and mother give to another as his son, provided that the donee have no issue, if the boy be of the same class, and affectionately disposed is considered as a son given, the gift being confirmed by pouring water."—***Manu.***

3. "A son formed of seminal fluids and of blood proceeds from his father and mother as an effect from its cause. Both parents have power to give, sell or disown him. But let no man give or accept an only son, since he must remain to raise up a progeny for the obsequies of ancestors. Nor let a woman give or accept a son, unless with the assent of her lord. He who means to adopt a son must assemble his kinsmen, give humble notice to the king, and then having made an oblation to fire with words from the Veda, in the midst of his dwelling-house, he may receive as his son by adoption, a boy nearly allied to him, or (on failure of such) even one remotely allied. But if doubt arise (as to his caste), let him treat the remote kinsman as a Sudra. The class ought to be known, for through one son the adopter rescues many ancestors. If after he has been adopted, a legitimate son be born, then the adopted son shall be participator of a fourth share."—***Vasistha.***

Note.—The texts prohibiting the adoption of an only son, and those directing the adoption of a near relative, have been held to be merely recommendatory, and not mandatory. Therefore neither the adoption of an only son nor the adoption of a stranger, though there be near relations, is invalid.

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445. Adoption in other systems of law.—Adoption is not recognized by the Mahomedan law (*p*), nor is it recognized by the English or the Parsi law. It is recognized by the Hindu law, but even in that system of law there may be a family (*q*) or caste (*r*) custom prohibiting adoption, and if such custom is proved, effect will be given to it by the Courts.

446. Different forms of adoption.—The ancient Hindu law recognized five kinds of adopted sons. The modern Hindu law recognizes only two, namely, the *dattaka* and the *kritrima*. The *dattaka* form is in use all over India. The *kritrima* form is prevalent in Mithila and the adjoining districts.

(*p*) *Muhammad Allahadad* v. *Muhamdad Ismail* (1888) 10 All. 289, 340.

(*q*) *Fanindra* v. *Rajeshwar* (1885) 11 Cal. 463, 12 I.A. 72.

(*r*) *Verabhai* v. *Bai Hiraba* (1903) 27 Bom. 492, 30 I.A. 234.

The ancient Hindu law recognized twelve kinds of sons, of whom five were adopted sons. Of these twelve only three are now recognized, namely, *aurasa* or legitimate son, *dattaka* or son given in adoption, and *kritrima* or son made. The whole of this chapter deals with *dattaka* adoption except sec. 515 which deals with *kritrima* adoption. **Ss. 446-449**

447. Object of adoption.—The objects of adoption are twofold: the first is religious, to secure spiritual benefit to the adopter and his ancestors by having a son for the purpose of offering funeral cakes and libations of water to the manes of the adopter and his ancestors. The second is secular, to secure an heir and perpetuate the adopter's name (*s*).

When a Hindu gives a boy in adoption, his act is, according to the Hindu Shastras, in the nature of a sacred gift voluntarily made. It is on that account that Manu requires the gift to be "confirmed by pouring water." A daughter *given* in marriage, which is called *kanyadan*, and a son *given* in adoption, which is called *putradan*, stand in this respect on the same footing. Both are gifts for religious and secular purposes (*t*).

448. Requirements of a valid adoption.—No adoption is valid unless—

(1) the person adopting is lawfully capable of taking in adoption [secs. 449-473];

(2) the person giving in adoption is lawfully capable of giving in adoption [secs. 474-479];

(3) the person adopted is lawfully capable of being taken in adoption [secs. 480-487];

(4) the adoption is completed by an actual giving and taking [sec. 489]; and

(5) the ceremony called *datta homam* (oblation to fire) has been performed. It is, however, doubtful whether the *datta homam* ceremony is essential in all cases to the validity of an adoption [sec. 490].

I. PERSONS WHO MAY LAWFULLY TAKE IN ADOPTION.

449. Who may adopt.—Every male may adopt provided he is otherwise competent to do so [sec. 450]. A wife also can adopt to her husband, but no other female can adopt to any other male; thus a mother cannot adopt to her son, nor a sister to her brother. A wife cannot adopt during her husband's lifetime except with his express consent (*u*). After his death,

(*s*) *Sitaram* v. *Harihar* (1911) 35 Bom. 169, 179, 180, 8 I.C. 625; *Bal Gangadhar Tilak* v. *Shrinivas* (1915) 42 I.A. 135, 154, 39 Bom. 441, 470, 29 I.C. 639, ('15) A.PC. 7.

(*t*) 35 Bom. 169, 179, 180, 8 I.C. 625, *supra*.

(*u*) *Narayan* v. *Nana* (1870) 7 Bom. H.C.A. C. 153.

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she may adopt, in certain parts of British India, only if he has expressly authorized her to adopt, and in other parts of British India, even without such authority [sec. 452]. But in no case can a wife or a widow adopt a son to *herself*; the adoption must be made *to her husband*. An adoption by a woman of a son *to herself* is invalid and it confers no legal rights upon the person adopted (*v*).

It will be seen from the above that a Hindu may either himself adopt, or delegate the power to adopt to his wife. But he cannot delegate the power to any other person. As to Kritrima adoption, see sec. 515.

450. Adoption by male. (*1*) Subject to the provision of any law for the time being in force, every male Hindu, who is of sound mind (*w*), and has attained the age of discretion, even though he may be a minor (*x*), may lawfully take a son in adoption, provided he has no son, grandson, or great-grandson natural or adopted (*y*), living at the time of adoption.

The High Court of Bombay has held that a Hindu, who has a son, grandson or great-grandson living at the time, cannot adopt even if the son, grandson or great-grandson, is disqualified from inheriting on any of the grounds mentioned in section 98 (*1*) above (*z*), *e.g.* if he is a congenital idiot (*a*). The High Court of Madras has dissented from that view and held that he can adopt (*b*). Even according to the Madras view, such an adoption would, since the Hindu Inheritance (Removal of disabilities) Act, 1928, be invalid, unless the son, grandson, or great-grandson was a lunatic or idiot from birth. See sec. 98 (*2*).

(*2*) The fact that the adopter is a bachelor (*c*), or a widower (*d*) or that his wife does not consent to the adoption (*e*), or that she is at the time of adoption pregnant to his knowledge (*f*), does not prevent him from taking a son in adoption.

(*v*) *Chowdry Pudum Singh* v. *Koer Oddey Singh* (1869) 12 M I A. 350, 356; *Narendra* v. *Dina Nath* (1909) 36 Cal. 824, 3 I.C. 996.

(*w*) *Tayammaul* v. *Sashachalla* (1865) 10 M I.A 429, pp 434-35; *Seshamma* v *Padmanabha Rao* (1917) 40 Mad. 660, 33 I.C. 578, ('17) A M. 265.

(*x*) *Rajendro Narain* v. *Saroda* (1871) 15 W.R. 548; *Jumoona Dassya* v. *Bama Soondari* (1876) 1 Cal. 289, pp. 295-96, 3 I A. 72, pp. 83-84; *Patel Vandravan* v. *Patel Manilal* (1891) 15 Bom. 565, *Sattiraju* v. *Venkataswami* (1917) 40 Mad. 925, 928-29, 40 I C. 518, ('18) A.M. 1072, *Kashinath Balakrishna* v. *Anant Murlidhar* (1942) Bom. 782, 203 I.C. 352, ('42) A.B. 284.

(*y*) *Gopee Lal* v. *Chundraolee* (1872) I.A. Sup. Vol 131.

(*z*) *Bharmappa* v. *Ujjangauda* (1922) 46 Bom. 455, 65 I.C. 216, ('22) A B. 173.

(*a*) *Krishnaji Hanmant* v *Raghavendra Keshav* (1942) Bom. 486, 201 I.C. 401, ('42) A.B. 178.

(*b*) *Nagammal* v. *Sankarappa*, (1931) 54 Mad. 576, 131 I.C. 9, ('31) A.M. 264.

(*c*) *Gopal* v. *Narayan* (1888) 12 Bom. 329.

(*d*) *Chandrasekharudu* v. *Bramhanna* (1869) 4 Mad. H.C. 270.

(*e*) *Rungama* v. *Atchama* (1846) 4 M I.A 1.

(*f*) *Nagabhushanam* v. *Seshammagaru* (1881) 3 Mad. 180; *Daulat Ram* v. *Ram Lal* (1907) 29 All 310; *Hanmant* v. *Bhimacharya* (1888) 12 Bom. 105.

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Illustrations.

(a) *A*, who has an adopted son *B*, adopts *C*. The adoption is not valid, for a Hindu cannot have two adopted sons at the same time (*g*).

(b) *A* has a grandson *B*, who is dumb, the dumbness being congenital and incurable. *A* cannot be said to be sonless so as to make an adoption by him in the lifetime of *B* valid (*h*).

(c) *A* has a son *B* who is an outcast. Can *A* take another son in adoption ? According to the pure Hindu law *A* can adopt, for *B*, being an outcast, cannot perform obsequial rites and is not entitled to inherit to him. But it is a question whether since the passing of Act 21 of 1850, the Courts would recognize the adoption, for having regard to the provisions of that Act, *B* would still be entitled to inherit to *A*, though he might be an outcast. The remarks which apply to an outcast apply also to one who has renounced the Hindu religion.

Minor.—Under the Indian Majority Act, 1875, minority extends to the end of the eighteenth year, except in cases where a guardian has been appointed by a Court of Justice, or where the minor is under the jurisdiction of the Court of Wards, in which cases it lasts till the end of the twenty-first year. The Indian Majority Act, 1875, does not apply to Hindus in matters of adoption. Therefore, even a minor may adopt or authorise his widow to adopt, provided he has attained the age of discretion, that is, has completed the age of fifteen years (*i*).

Consent of Court of Wards.—There are local Acts which constitute Courts of Wards. These Acts contain provisions prohibiting a ward of the Court from adopting without the consent of the Court.

Illegitimate son.—The existence of an illegitimate son is no bar to an adoption (*j*).

Illatom adoption.—See the under-mentioned case (*k*).

451. Adoption by wife.—A wife cannot adopt a son to her husband during her husband's lifetime except with his express consent (*l*).

The case of an adoption by a wife during her husband's lifetime is very rare.

452. Adoption by widow.—The law as to adoption by a widow is different in different provinces (*m*):—

(1) In Mithila a widow cannot adopt at all, not even if she has the express authority of her husband.

(2) In Bengal, Benares (*n*) and Madras a widow may adopt under an authority from her husband in that behalf.

(*g*) (1846) 4 M.I.A. 1, *supra*; *Mohesh* v. *Taruck* (1893) 20 Cal. 487, 20 I.A. 30.

(*h*) *Bharmappa* v. *Ujjangauda* (1922) 46 Bom. 455, 65 I.C. 216, ('22) A.B. 173.

(*i*) *Sattiraju* v. *Venkataswami* (1917) 40 Mad. 925, 928-29, 931-33, 40 I.C. 518, ('18) A.M. 1072.

(*j*) *Maharaja of Kolhapur* v. *Sundaram* (1925) 48 Mad. 1, 93 I.C. 705, ('25) A.M. 497.

(*k*) *Nalluri* v. *Kamepalli* (1919) 46 I. A. 168, 42 Mad. 805, 51 I.C. 1, ('19) A PC. 162.

(*l*) *Narayan* v. *Nana* (1870) 7 B. H. C. A. C 153.

(*m*) *Collector of Madura* v. *Mootoo Ramalinga* (1868) 12 M.I.A. 397, 435-36.

(*n*) *Balu Motising* v. *Durgabai* (1929) 53 Bom. 242, 114 I.C. 379, ('29) A.B. 57.

S. 452 Such authority may be express or implied. It cannot be implied from the mere absence of a prohibition to adopt (*o*).

(3) In the Madras Presidency a widow may also adopt without her husband's authority, if where the husband was separate at the time of his death, she obtains the consent of his *sapindas*, and where he was joint, she obtains the consent of his undivided coparceners. This subject is considered more fully in sec. 462 below.

(4) In the Bombay Presidency, a widow may adopt even without any authority. See sec. 463 below.

Among the Jains of the Bombay Presidency who migrated from Jodhpur a Jain widow can adopt without the authority of her husband (*p*).

Among the Raghubansi Rajputs who immigrated from Ayodhya to Chindwara a widow may adopt without authority of her husband (*q*).

The difference of opinion between the various schools of Hindu law noted above arises from different interpretations put upon a text of Vasistha, which says :—" Nor let a woman give or accept a son, unless with the assent of her lord." All the schools accept the above text as authoritative, but the Mithila school takes it to mean that the assent of the husband must be given *at the time of the adoption*, and, therefore, a widow cannot adopt at all. The Benares and Bengal schools interpret the text as requiring an express permission given by the husband in his lifetime, but capable of taking effect after his death. The Bombay school explains the text away by saying that it applies only to an adoption made in the husband's lifetime, and is not to be taken to restrict the widow's power to do that which the general law prescribes as beneficial to her husband's soul. According to this school the assent of the husband is presumed, so that a widow may adopt even to her deceased minor husband (*r*). The law in Madras stands intermediate between the law in Bengal and the law in Bombay. According to the Dravida (Madras) school, the word " husband ", or " lord " in the above text is merely illustrative, and means the guardians of the widow for the time being, so that the assent of the husband's *sapindas* who are the widow's guardians after her husband's death is sufficient to enable her to adopt ; but she cannot adopt without their assent even if he was separate at the time of his death.

Adoption by Jain widow.—A Jain widow cannot adopt a son to her husband without the authority of her husband or the consent of his *sapindas* (*s*), in the absence of proof of a custom to the contrary (*t*).

(*o*) *Balasubramanya Pandya Thalaivar* v. *Subbayya Thevar* (1938) 65 I.A. 93, (1938) Mad. 551, 40 Bom. L.R. 704, 72 I.C. 724, ('38) A.PC. 34.

(*p*) *Suganchand Bhikhanchand* v. *Mangibhai Gulabchand* (1942) Bom. 467, 201 I.C. 759, ('42) A.B. 185; *Yamashetti Bhaushetti* v. *Ashok Bhaushetti* (1940) Bom. 819, 191 I.C. 488, ('40) A.B. 391.

(*q*) *Mst. Kresarbai* v. *Inde Singh* (1945) Nag. 1, 71 I.A. 190.

(*r*) *Patel Vandravan* v. *Patel Manilal* (1891) 15 Bom. 565.

(*s*) *Peria Ammani* v. *Krishnasami* (1893) 16 Mad. 182 ; *Gettappa* v. *Eramma* (1927) 50 Mad. 228, 97 I.C. 503, ('27) A.M. 228.

(*t*) *Lakhmi Chand* v. *Gatto Bai* (1886) 8 All. 319 ; *Manohar Lal* v. *Banarsi Das* (1907) 29 All. 495 ; *Asharfi Kunwar* v. *Rup Chand* (1908) 30 All. 197 ; *Harnabh Pershad* v. *Mandil Dass* (1900) 27 Cal. 379.

ADOPTION BY WIDOW UNDER EXPRESS AUTHORITY FROM HER HUSBAND.

453. Who may give authority to adopt.—Every Hindu of sound mind who has attained the age of discretion may authorize his wife (except in Mithila) to adopt a son to him after his death, even if he has not attained the age of majority (*u*). **Ss. 453, 454**

The authority to adopt may be given by the husband, even if he was a member of a Mitakshara joint family at the time of his death (*v*). Thus if *A* and *B* are members of a Mitakshara joint family, either of them may authorize his wife to adopt a son to him after his death. As to adoption by a minor, see notes to s. 450 above.

454. Authority to widow to adopt.—(*1*) *Authority can be given to widow alone.*—The authority to adopt can be given to the widow alone, and not to any other person, nor can it be given to the widow conjointly with another (*w*).

(*2*) *Joint authority to widow and another.*—Where the authority to adopt is given to the widow conjointly with another person, the authority is void and an adoption made in pursuance of such authority is invalid (*x*).

(*3*) *Authority to widow to adopt with consent of a specified person.*—But though a Hindu cannot join any other person with his wife in making an adoption, he may direct his wife to adopt with the consent of a specified person, or he may direct her not to adopt without the consent of a specified person. Where the direction is to adopt with the consent of a specified person, and it appears from the context and surrounding circumstances that the consent was to be a condition precedent, as where the wife is very young and the paramount intention shown by the document giving authority to adopt is not to obtain the spiritual benefits arising from the adoption but to have a son to inherit, an adoption made without the consent of the person named is invalid, whether such person be alive or dead at the time of adoption (*y*). Where the boy to be adopted was to be chosen by four executors and one of the executors selected the boy after consulting the co-executors who did not express their disapproval either before or at the

(*u*) *Patel Vandravan* v. *Patel Manilal* (1891) 15 Bom. 565.

(*v*) See *Bachoo* v. *Mankorebai* (1907) 31 Bom. 373, 34 I.A. 107.

(*w*) *Amrito Lal* v. *Surnomoye* (1900) 27 Cal. 996, 27 I.A. 128; *Bhagvandas* v. *Rajmal* (1873) 10 Bom. H.C. 241 [Jains].

(*x*) *Amrito Lal* v. *Surnomoye* (1900) 27 Cal. 996, 27 I.A. 128.

(*y*) *Rajendra Prasad* v. *Gopal Prasad* (1930) 57 I.A. 296, 10 Pat. 187, 127 I.C. 743, ('30) A.PC. 242, reversing s.c. in (1928) 7 Pat. 245, 108 I.C. 545, ('29) A.P. 51, *Radha Mahadeb Jiu* v. *Rajendra Prasad Bose* (1933) 12 Pat. 727, 149 I.C. 809, ('33) A.P. 250.

Ss. 454, 455

time of adoption, the adoption was held to be valid (*z*). Where the direction is that she should not adopt without the consent of a specified person, an adoption made without such consent is invalid in every case whether such person be alive or dead at the time of adoption (*a*). But where she is merely directed to consult a specified person, she is not bound to do so, and she may adopt without consulting such person (*b*).

Illustrations.

(a) *A* by his will *authorizes his wife and his executors* to adopt a son to him. If an adoption is made in pursuance of such authority by *A*'s widow and his executors, the adoption is invalid. The adoption will also be invalid, even if it is made by the widow alone, for the authority to adopt is not given to her singly, but to her conjointly with others.

(b) A Hindu by his will appoints five persons as executors and trustees, and authorizes his widow to make an adoption *with the consent* of those persons. Four of the trustees prove the will and undertake the trust, but the fifth declines to do so. An adoption by the widow with the consent of the four who prove the will is valid: *Bal Gangadhar Tilak* v. *Shrinivas* (1915) 42 I.A. 135, 39 Bom. 441, 29 I.C. 639, ('15) A. PC. 7.

455. Authority to co-widows.—(*1*) Where there are two or more widows, and the authority to adopt is given to *one of them* only, she may adopt without consulting the other widows, and she alone, it seems, can adopt (*c*).

(*2*) In *Narsimha* v. *Parthasarathi* (*d*) a case from Madras, their Lordships of the Privy Council left it an open question, whether if a power to adopt were given to two or more widows *jointly*, such power would be valid, but they held that even if it were so, it must be exercised by them all and that it could not be exercised after the death of any one of them. In that case their Lordships observed that such a power might be supported by custom, and that there were indications in the cases cited before them that in some parts of India such a power might perhaps be interpreted as giving a preferential right of adoption to the senior widow. It has since been held by the High Court of Madras that where a joint power of adoption is given to two widows, an adoption made by them jointly is not invalid, though the son adopted would in law be the son only of the senior

(*z*) *Rattanlal* v. *Baijnath* (1939) Lah. 1 (P.C.), 169 I.C. 902, ('37) A.PC. 292.

(*a*) *Rangubai* v. *Bhagirathibai* (1878) 2 Bom. 377 (1900) 27 Cal. 996, 1002, 27 I.A. 128, 132, 134, *supra*; *Bal Gangadhar Tilak* v. *Shrinivas* (1915) 42 I.A. 135, 39 Bom. 441, 29 I.C. 639, ('15) A.PC. 7.

(*b*) *Surendra Nandan* v. *Sailaji* (1891) 18 Cal. 385, cited with approval in *Kannepalli Suryanarayana* v. *Venkataramana* (1906) 29 Mad. 382, 33 I.A. 145.

(c) Strange's Hindu Law, vol. ii, 91; Mayne's Hindu Law, 118.

(*d*) (1914) 37 Mad. 199, 220-221, 41 I.A. 51, 69-70, 23 I.C. 160; *Lachmi* v. *Musammut Parbati* (1920) 42 All. 266, 54 I.C. 910, ('20) A.A. 166. See also *Sarada Prosad* v. *Rama Pati* (1912) 17 C.W.N. 319, 16 I.C. 817.

widow who alone has the preferential right to adopt, the junior widow being considered only as his step-mother. The decision proceeds on what is called "the genius of the Hindu law" and "the custom and consciousness of the community at large at any rate in South India" (*e*). Where a deed conferred on both the widows authority to adopt and further provided that if any one was not willing to adopt, the other may do so, it was held that the authority was valid (*f*). Ss. 455, 456

(*3*) Where the authority to adopt is given to the widows *severally*, the senior widow has the prior right to exercise the power of doption. The junior widow has no right to adopt unless the senior widow refuses to do so (*g*). A widow cannot adopt when her co-widow has validly adopted and the adopted son is living (*h*). See secs. 462 (*8*), 463 (*1*), and 470.

Illustration.

A Hindu testator, having two wives, directed by his will as follows :—" You " (meaning his two wives) " should adopt a boy who is our *sonnihita* whenever it strikes you that our *Samastanam* should continue. In all matters both should act without quarrelling." Both wives survived the testator. After the death of one of the widows the other adopted a son to the testator. *Held* by the Privy Council that the power to adopt was *joint*, and that it could not be validly exercised by one widow after the death of the other, and that the adoption was therefore invalid : *Narasimha* v. *Parthasarathy* (1914) 37 Mad. 199, 41 I.A. 51, 29 I.C. 166.

456. Form of authority.— (*1*) The authority to adopt may be given verbally or in writing. If it is in writing, it must be registered, unless the authority is given under a will (*i*).

(*2*) If the authority is contained in a will, the will must be executed in accordance with the formalities required by the Indian Succession Act, 1925, s. 63.

(*3*) *Minor's will.*—If an authority to adopt is given by a minor by a writing purporting to be a will, the document must be registered. The reason is that a minor cannot make a will (*j*), and the writing can only be treated as non-testamentary, in which case it must be registered as required by law (*k*).

(*e*) *Tiruvengalam* v. *Butchayya* (1929) 52 Mad. 373, 113 I.C. 347, ('29) A.M. 11.

(*f*) *Rajaram* v. *Joti Prasad* (1943) All. 747, 209 I.C. 169, ('43) A.A. 319.

(*g*) *Bijoy* v. *Ranjit* (1911) 38 Cal. 694, 12 I.C. 460. *Mondakini Dasi* v. *Adinath Dey* (1891) 18 Cal. 69 ; *Ranjit Lal* v. *Bijoy Krishna* (1912) 39 Cal. 582, 14 I.C. 17.

(*h*) *Shivappa Rudrappa* v. *Rudrava Chanbasappa* (1933) 57 Bom 1, 142 I.C. 164, ('32) A B 410.

(*i*) *Mussaddi Lal* v. *Kundan Lal* (1906) 28 All. 377, 33 I A. 55 Registration Act, 1908, s. 17(3). See *Ranat* v. *Beni Bahadur* (1926) 1 Luck. 403, 98 I.C. 567, ('26) A.PC. 97.

(*j*) Indian Succession Act, 1925, s. 59.

(*k*) *Vijayaratnam* v. *Sudarsana* (1925) 48 Mad. 614, 52 I.A. 305, 89 I C. 733, ('25) A PC. 196.

Ss. 457, 458

457. Conditional authority.—The authority to adopt may be conditional, but the condition must not be illegal. An authority to adopt in the event of a disagreement between the widow and the natural born son, even if the son should then be living, is invalid (*l*); the reason is that a Hindu cannot adopt while he has a son living [s. 450]. But an authority to adopt in the event of the natural born son dying under age and unmarried is valid (*m*).

458. Authority must be strictly followed.—The authority to adopt must be strictly obeyed (*n*). The duty of the widow is to obey such directions as her husband may have given as to the way in which she should exercise the power of adoption to him (*o*) or as to the boy to be adopted (*p*). Where the husband directed that the widow should adopt a boy from his family or of his gotra the adoption of any other boy is invalid (*q*). Thus where the authority to the widow is to adopt within a specified period, she cannot adopt after the expiration of that period (*r*). Similarly where the widow is authorized by her husband to adopt, "if no male or female child should be born to him," she cannot adopt if a daughter is born to him, although she may be born after his death (*s*). It has been held by the High Court of Bombay that where the widow is authorized by her husband to adopt a boy named by him, and she adopts the boy, she is not precluded from adopting another boy after the death of the adopted boy, unless there is a direction prohibiting her from adopting any other boy. Such a direction to operate as a prohibition against the widow adopting any boy, except the boy named by him, must be explicitly made and clearly intended by the husband to limit the discretion of the widow for all time, and on every occasion on which otherwise after his death his widow might validly make an adoption to him (*t*).

(*l*) *Solukhna* v. *Ramdolal* (1811) 1 Beng. S.D. 324 (2nd ed., 434).

(*m*) *Raja Vellanki* v. *Venkata* (1876) 1 Mad. 174, 4 I.A. 1.

(*n*) *Chowdhry Pudum Singh* v. *Koer Oddey Singh* (1869) 12 M.I.A. 350, 356; 2 Beng. L.R. (P.C.) 101, 12 W.R. (P.C.) 1; *Surendrakeshai* v. *Doorgasundari* (1892) 19 I.A. 108, 122, 19 Cal. 513; *Rajendra Prasad* v. *Gopal Prasad* (1930) 57 I.A. 296, 303, 10 Pat. 187, 196, 127 I.C. 743, ('30) A.PC. 242.

(*o*) *Sitabai* v. *Bapu* (1920) 47 I.A. 202, 205, 47 Cal. 1012, 1018, 57 I.C. 1, ('21) A.PC. 8; *Yadao* v. *Namdeo* (1921) 48 I.A. 513, 522, 49 Cal. 1, 12, 64 I.C. 538, ('22) A.PC. 216. See *Rajendra Prasad* v. *Gopal Prasad* (1928) 7 Pat. 245, 108 I.C. 545, ('29) A.P. 51.

(*p*) *Kalavati Devi* v. *Dharan Prakash* (1933) 55 All. 78, 60 I.A. 90, 142 I.C. 1, ('33) A.PC. 71.

(*q*) *Sundara Sirudu* v. *Adinarayana* (1940) Mad. 233, 189 I.C. 303, ('39) A.M. 909.

(*r*) *Mutsaddi Lal* v. *Kundan Lal* (1906) 28 All. 377, 33 I.A. 55.

(*s*) *Bhagwat Koer* v. *Dhanukhdhari* (1919) 46 I.A. 259, 47 Cal. 466, 53 I.C. 347, ('19) A.PC. 75.

(*t*) *Yadao* v. *Namdeo* (1921) 48 I.A. 513, 49 Cal. 1, 64 I.C. 536, ('22) A.PC. 216; *Lakshmibai* v. *Rajaji* (1898) 22 Bom. 996.

Illustrations.

(a) *A* authorised his wife, who was then pregnant, to adopt, in case "the *son* that might be born" dies. *A* dies, and after his death the widow is delivered of a *daughter.* The authority to adopt cannot be validly exercised (*u*).

(b) *A* authorizes his widow to adopt "one of the sons" of *B*. The authority to adopt will be deemed to have been strictly pursued if any one of *B*'s sons is adopted, whether he was in existence at the date of the authority or was born thereafter. Such an authority does not limit the widow's choice to a son of *B* who was in existence at the date of the authority: *Mutsaddi Lal* v. *Kundan Lall* (1906) 28 All. 377, 33 I. A. 55.

(c) *A* directs by his will that his widow *W* should "so far as possible adopt *S*, the second son of my elder brother: if he cannot be obtained, any other boy should be adopted with the advice of the trustees." In consequence of ill-feelings arising between *W* and *S* and his family, *W* adopts, with the consent of the trustees, her sister's son. The adoption is invalid. The words, "so far as possible," mean that unless there are conditions outside the will preventing the possibility of the adoption, the widow when she does adopt, is to exercise her power in favour of *S*. The boy could be obtained and mere ill-feeling between *W* and *S* and his family could not justify *W* in disobeying the mandatory directions of her husband: *Sitabai* v. *Bapu* (1920) 47 I.A. 202, 47 Cal. 1012, 57 I.C. 1, ('21) A.PC. 8.

459. Exercise of authority to adopt discretionary: no limit of time.—A widow who is authorised by her husband to adopt may or may not adopt, at her discretion. She is under no legal obligation to adopt, even if she has been expressly directed by her husband to do so. Her rights to the husband's estate are not in any way affected by her omission or refusal to adopt (*v*). Nor is there any limit to the time during which she may act upon the authority given to her [s. 471 (*4*)]. See, however, secs. 471-472.

460. Revocation of power to adopt.—(*1*) An authority to adopt may be revoked either expressly or impliedly.

(*2*) If the authority is contained in a will to which the provisions of the Indian Succession Act, 1925, apply, it can only be revoked in the manner provided by sec. 70 of that Act.

Illustration.

A Hindu disposes of his ancestral property by a will made in 1889. At the date of the will he was the sole surviving coparcener with regard to that property, and as such entitled to dispose of the property by will [s. 255]. The will contains an authority to the widow to adopt *V* if she did not adopt him in his lifetime, and, in the event of *V*'s death in the wife's lifetime, to adopt *P*. The testator adopts *V* in 1890, the legal result of which is that he admits *V* as a coparcener in the family. He *then* makes another will which contains a disposition of property inconsistent with the first will but contains

(*u*) *Mohendrolall* v. *Rookiney Dabee* (1864) 1 Coryton 42.

(*v*) *Mutsaddi Lal* v. *Kundan Lal* (1906) 28 All. 377, 33 I.A. 55; *Shamavahoo* v. *Dwarkadas* (1888) 12 Bom. 202; *Uma Sundari* v. *Sourobinee* (18[illegible]) 7 Cal. 288; *Narayan Ayyangar* v. *Venguammal* (1938) Mad. 621.

Ss. 460-462

no express revocation of the earlier will nor of the authority to adopt therein contained. The testator dies leaving his widow and *V*. *V* dies next without issue. After *V*'s death the widow adopts *P*. The adoption of *P* is valid, for though the second will is invalid in so far as it purports to dispose of the coparcenary property [the testator not then being the sole coparcener], it does not revoke the authority to adopt contained in the first will: *Venkatanarayana* v. *Subbammal* (1916) 43 I.A. 20, 39 Mad. 107, 32 I.C. 373, ('15) A. PC. 37.

Note.—As to the termination of a widow's power to adopt, even under the authority of her husband, see secs. 471 and 472.

Having noted the peculiar features of an adoption by a widow under an express authority from her husband, we proceed to deal with adoption by a widow *without* such authority. This is possible only in the Madras and Bombay Presidencies.

ADOPTION BY WIDOW WITHOUT HUSBAND'S AUTHORITY.

461. Adoption by widow without husband's authority.—The only parts of British India where a widow may adopt without an express authority from her husband are the Madras and Bombay Presidencies.

462. In Madras.—In the Madras Presidency, a widow may adopt without authority from her husband, subject to the following conditions [s. 452 (*3*)]:—

(1) She cannot adopt, if there is an express or implied prohibition from her husband. A prohibition ought not to be inferred from the mere fact that the husband and wife were living separate (*w*). See sec. 463 (*1*).

(2) If the husband was *separated* at the time of his death, she must obtain the consent of her father-in-law, and his consent as the head of the family is sufficient. If the father-in-law is then dead, she must obtain the consent of her husband's sapindas, but need not obtain the consent of the daughter's son (*x*). But the consent necessary to validate the adoption is not the consent of every sapinda, however remote (*y*). The consent required is that of a substantial majority of the nearest sapindas who are capable of forming an intelligent and honest judgment in the matter (*z*). For instance, where the consent of the nearest divided Sapindas was sought on the ground that the only undivided sapinda was

(*w*) *Collector of Madura* v. *Moottoo Ramalinga* (1868) 12 M.I.A. 397 [known as the *Ramnad* case]; *Muthusami* v. *Pulavaratal* (1922) 45 Mad. 266, 66 I.C. 504, ('22) A.M. 106.

(*x*) *Seshamma* v. *Narasimharao* (1940) Mad. 454, 188 I.C. 250, ('40) A.M. 336.

(*y*) *Collector of Madura* v. *Moottoo Ramalinga* (1868) 12 M.I.A. 397; *Viswasundara* v. *Somasundra* (1920) 43 Mad. 876, 59 I.C. 609, ('20) A.M. 451 [consept of daughter's son not necessary].

(*z*) *Adusumilli* v. *Adusumilli* (1920) 47 I.A. 99, 43 Mad. 650, 56 I.C. 391, ('20) A.PC. 4; *Venkatakrishnamma* v. *Annapurnamma* (1900) 23 Mad. 486.

insane and some of them refused to consent alleging that he was sane, while he was really insane, it was held that their refusal may be ignored (*a*). Where the nearest Sapindas have capriciously withheld their consent, all that is necessary is a preponderance of opinion among the reversioners in favour of the adoption. There need be no family council in the order of the degree of relationship nor is it necessary that all of them should be consulted. The widow need not consult her step-daughter (*b*). The absence of consent on the part of the nearest sapindas cannot be made good by the authorization of distant relatives whose assent is more likely to be influenced by improper motives (*c*). This does not mean that the consent of a near sapinda who is incapable of forming a judgment on the matter, such as a minor or lunatic, is either sufficient or necessary ; nor does it exclude the view that, where a near relative is clearly proved to be actuated by corrupt or malicious motives, his dissent may be disregarded. Nor does it contemplate cases where the nearest sapinda happens to be in a distant country and it is impossible without great difficulty to obtain his consent, or where he is a convict or suffering a term of imprisonment. Save in exceptional cases such as those mentioned above, the consent of the nearest sapindas must be asked (*d*), and if it is not asked, it is no excuse to say that they would certainly have refused (*e*). In short, "there should be such proof of assent on the part of the sapindas as should be sufficient to support the inference that the adoption was made by the widow, not from capricious or corrupt motives or in order to defeat the interest of this or that sapinda, but upon a fair consideration by what may be called a family council, of the expediency of substituting an heir by adoption to the deceased husband" (*f*). In the absence of agnate reversioners, the widow can adopt with the consent of the nearest cognate reversioner, *e.g.*, the father's sister's son (*g*). It has been held in Rangoon that, if there are no sapindas, the widow has an unrestricted power to adopt (*h*). But this view seems to be opposed to principle and authority (*i*). S. 462

(*a*) *Chellathammal* alias *Ammumuthammal* v. *Kalithurtha Pillai* (1943) Mad. 107, 202 I.C. 747, ('42) A.M. 606.

(*b*) *Brahma Sastri* v. *Sumitramma* (1934) 57 Mad. 411, 151 I.C. 200, ('34) A.M. 191.

(*c*) *Veera* v. *Balasurya* (1918) 45 I.A. 265, 41 Mad. 998, 48 I.C. 706, ('18) A.PC. 97.

(*d*) *Adusumilli* v. *Adusumilli* (1920) 47 I.A. 99, 102, 43 Mad. 650, 654, 56 I.C. 301, ('20) A.PC. 4.

(*e*) *Venkamma* v. *Subrahmanian* (1907) 34 I.A. 22, 30 Mad. 50, 53, affmg. (1903) 26 Mad. 627.

(*f*) *Raja Vellanki* v. *Venkata Rama* (1876) 1 Mad. 174, 190-191, 4 I.A. 1, 14.

(*g*) *Kesar Singh* v. *Secretary of State* (1926) 49 Mad. 652, 95 I.C. 651, ('26) A. M. 881.

(*h*) *Patnaloo Appalswamy* v. *E. Moosalaya* (1934) 12 Rang. 22, 147 I.C. 710, ('33) A.R. 334.

(*i*) *Balasubramanya Pandya Thalaivar* v. *Subbayyatevar* (1938) 65 I.A. 93 (1938) Mad. 551, 40 Bom. L.R. 704, 172 I.C. 724, ('38) A.PC. 34.

S. 462 Where the nearest sapinda consents to an adoption but dies before the adoption, the adoption is nevertheless valid, provided there has been no material change of circumstances during the interval and there are no other grounds on which the adoption when actually made could be objected to by the then nearest sapindas. A widow may adopt with the authority of the nearest sapinda though no particular boy was mentioned, within a reasonable period and when the circumstances have not materially changed (*j*). Where a Hindu dies leaving a widow and a son, the widow, of course, cannot adopt to her husband while the son is living—not even with his consent. But the son may consent to an adoption by the widow (his own mother) by his will, and such consent will validate an adoption made after his death. The fact that the son could have no interest in the estate after his death does not vitiate the consent. Nor is the adoption vitiated by the fact that the consent of sapindas living at the time of adoption has not been obtained (*k*). A sapinda having duly given his consent cannot arbitrarily or capriciously withdraw it (*l*).

12 M. I. A. 397—adoption with consent of all nearest sapindas held valid.

4 I. A. 1=1 Mad. 174— " " " " "

45 I. A. 265=41 Mad. 998=48 I. C. 706=('18) A.PC. 97—adoption made without consent of nearest sapindas held invalid.

47 I. A. 99=43 Mad. 650=56 I. C. 391=('20) A.PC. 4—adoption with consent of 1 out of 6 sapindas, it not having been proved that the widow had applied for the consent of the rest except one, held invalid.

(3) If the husband was *joint* at the time of his death, the widow must obtain the consent of her father-in-law, and such consent is sufficient. If the father-in-law is then dead, the consent of *all* the husband's brothers or other coparceners in whom the interest of the deceased has vested by survivorship would *probably* be required, since it would be unjust to allow the widow to defeat their interest by introducing a new coparcener against their will (*m*).

(4) Where the husband dies leaving undivided coparceners and divided sapindas, the widow should obtain the consent of the undivided coparceners. An adoption with the

(*j*) *Vasireddi Venkayya* v. *Gopu Sreeramulu* (1942) Mad. [illegible]3, ('41) A.M. 935 [F.B.].

(*k*) *Annapurnamma* v. *Appayya* (1929) 52 Mad. 620, 119 I.C. 389, ('29) A.M. 577 [F.B.]. overruling *Mami* v. *Subbarayar* (1913) 36 Mad. 145, 19 I.C. 663.

(*l*) *Sivasuryanarayana* v. *Audinarayana* (1937) Mad. 347 (F.B.), 166 I.C. 339, ('37) A.M. 110.

(*m*) *Collector of Madura* v. *Moottoo Ramalinga* (1868) 12 M.I. A. 397, 441-442. But see *Venkatakrishnamma* v. *Annapurnamma* (1900) 23 Mad. 486, 487-488, and *Narayanasami* v. *Mangammal* (1905) 28 Mad. 315, 319.

consent of divided sapindas, but without the consent of the undivided coparceners is, it seems, invalid (*n*). The widow of a member of a joint family can adopt a son to her deceased husband with the assent of the nearest divided sapindas when the only surviving coparcener is insane (*o*). S. 462

(4A) Though the husband was joint at the time of his death, and the coparceners afterwards separate, the widow can adopt with their consent. In this case the widow was in enjoyment of her father's property as heir and the father's reversioners questioned the validity of the adoption (*p*).

(5) Where the consent is obtained by the widow by a misrepresentation, as, for instance, that her husband had authorized her to adopt, but no such authority was given in fact, the adoption is invalid (*q*).

(6) Where the consent is given by the husband's kinsmen from interested motives, the adoption is invalid (*r*). It is also invalid where the consent is purchased, that is obtained by the widow in exchange for a sum of money or other valuable consideration (*s*). But there is nothing improper in a coparcener making it a condition of his consent that his own share should not be reduced by the adoption (*t*).

(7) Where the consent of the husband's kinsmen has been obtained, the widow's power to adopt is co-extensive with that of the husband. She may, therefore, adopt even an only son (which, though irreligious, is not illegal), just as much as her husband could have done (*u*) [sec. 481].

(8) An adoption made by the senior widow with the consent of the sapindas is valid, though made without the consent of the junior widow (*v*). But an adoption made by a junior widow without the consent of the senior widow is invalid though made with the consent of her husband's sapindas (*w*).

(9) As to widow's motive in making an adoption, see s. 469.

(*n*) *Sri Raghunada* v. *Broto Kishoro* (1876) 1 Mad. 69, 3 I.A. 154.

(*o*) *Chellathammal alias Ammamuthummal* v. *Kalithurtha Pillai* (1943) Mad. 107, 202 I.C. 747, ('42) A.M. 606.

(*p*) *Panyam* v. *Ramalakshmamma* (1932) 55 Mad. 581, 138 I.C. 170, ('32) A.M. 227.

(*q*) *Karunabdhi Ganesa* v. *Gopala* (1880) 2 Mad 270, 7 I.A. 173; *Venkamma* v. *Subramaniam* (1907) 30 Mad. 50, 34 I.A. 22.

(*r*) (1880) 2 Mad. 270, 7 I.A. 173, *supra*.

(*s*) *Dinakoti* v. *Balasundra* (1913) 36 Mad. 19, 18 I.C. 959, explaining *Collector of Madura* v. *Moottoo Ramalinga* (1868) 12 M.I.A. 397, 443.

(*t*) *Srinivasa* v. *Rangasami* (1907) 30 Mad. 450.

(*u*) *Sri Balusu Gurulingaswami* v. *Sri Balusu Ramalakshmamma* (1899) 22 Mad. 398, at p. 408, 26 I.A. 113 at p. 128.

(*v*) (1905) 28 Mad. 315, *supra*.

(*w*) *Rajah Venkatappa* v. *Benga Rao* (1916) 39 Mad. 772, 30 I.C. 106, ('16) A.M. 919; *Muthusami* v. *Pulavaratal* (1922) 45 Mad. 266, 66 I.C. 504, ('22) A.M. 106.

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463. In Bombay.—In the Bombay Presidency, a widow may adopt without authority from her husband, subject to the following conditions [s. 452 (*4*)]:—

(1) She cannot adopt, if there be an express or implied prohibition from her husband (*x*). A mere refusal by her husband to adopt does not of itself amount to such a prohibition (*y*). Further, she cannot dispute an adoption made by her husband (*z*), nor can she adopt during the lifetime of a son adopted by her husband, though the validity of the adoption by her husband is doubtful (*a*). The power of a widow to adopt after her husband's death is subject only to such restrictions if any as he may have imposed upon her (*b*). As a Hindu widow in Bombay has an inherent power to adopt, a prohibition or restriction, by the husband must be explicit. Where the husband prohibited the adoption of a son of V or K, but recommended that the son of one of his nephews should be adopted and the parents of the nephews were all dead, it was held that the adoption of a son of a nephew was valid (*c*). The statement by the testator who gave all his property for charity that he is not going to adopt and that he is not going to give authority to his wife to adopt does not amount to an implied prohibition by him of an adoption by the widow in respect of watan property. The adoption by the widow after his death (which in Bombay requires no authority) is valid as regards that property (*d*). See sec. 462 (*1*).

(2) If the husband was *separate* at the time of his death, and the widow has succeeded to his estate as his heir, she may take a son in adoption without the consent of her husband's sapindas (*e*).

(3) The law relating to the power (to adopt) of a widow, whose husband was *joint* at the time of his death, has been the subject of fluctuations. Four distinct landmarks may be recognised.

(*x*) *Gopal* v. *Vishnu* (1899) 23 Bom. 250, 256; *Lakshmibai* v. *Saraswatibai* (1899) 23 Bom. 789, 795-797; *Malgavda* v. *Babaji* (1913) 37 Bom. 107, 17 I.C. 748.

(*y*) *Sitabai* v. *Govindrao* (1927) 51 Bom. 217, 101 I. C. 46, ('27) A.B. 151; *Ishwar Dadu* v. *Gajabai* (1926) 50 Bom. 468, 537, 96 I.C. 712, ('26) A.B. 435 [F.B.]. See *Bayabai* v. *Bala* (1870) 7 Bom. H. C. App. I discussed in *Sitabai*'s case.

(*z*) *Chimabai* v. *Mallappa* (1922) 46 Bom. 946, 67 I.C. 354, ('22) A. B. 397.

(*a*) *Bhau* v. *Narasagouda* (1922) 46 Bom. 400, 64 I.C. 614, ('22) A. B. 300, affmg. *Bhujangouda* v. *Babu* (1920) 44 Bom. 627, 57 I.C. 573, ('20) A.B. 115.

(*b*) *Jagannath Rao Dani* v. *Ram Bharosa* (1933) 60 I.A. 49, 141 I.C. 520, ('33) A. PC. 33.

(*c*) *Damodar Vishnu* v. *Shriram Laxman* (1941) Bom. 170, 193, I.C. 413, ('41) Bom. 56.

(*d*) *Vithagouda* v. *Secretary of State* (1932) 34 Bom. L. R. 818, 140 I.C. 242, ('32) A.B. 442.

(*e*) *Rakhmabai* v. *Radhabai* (1868) 5 Bom. H. C. A. C. 181; *Collector of Madura* v. *Moottoo Ramalinga* (1868) 12 M.I.A. 397, at p. 436.

(i) (1879-1921). In 1879 a Full Bench of the Bombay High Court held (*f*) that such a widow cannot adopt, when she has not the authority of her husband or the consent of his undivided coparceners. In 1891, it was held that the consent of the father-in-law at the time of adoption is sufficient (*g*). **S. 463**

(ii) (1921-1925). In the case of *Yadao* v. *Namdeo* (*h*) which went up on appeal to the Judicial Committee from the Central Provinces, the parties were Hindus to whom the Hindu law applicable to Hindus of the Maharatta country of the Presidency of Bombay applied. The facts were that one Pundlik, his cousin Namdeo, and Namdeo's sons Rambhau and Pandurang, were members of a joint family. Pundlik died childless in 1905. Soon after, Namdeo gave his son Pandurang in adoption to Pundlik's widow. The adoption was evidenced by a deed. Pandurang died unmarried in 1907 and the widow adopted a stranger without the consent of Namdeo. The Judicial Commissioner of Nagpur held that Pandurang and Namdeo's family were undivided at the time of Pandurang's death and that the adoption, having been made without the consent of Namdeo and his son, was invalid. The Judicial Committee reversed the decision and held that the adoption was valid.

They observed "Their Lordships find as a fact and hold in law that on the date of that deed Namdeo and his son Rambhau had separated from Pandurang, and had ceased to be members with Pandurang of the joint family, although no partition of the family property had been effected." Later on, they also observed referring to the decision in *Bayabai* v. *Bala* (*i*), "There is nothing in the judgment of Westropp, J., which confined his observations as to the power of a Hindu widow in the Maharatta country of the Bombay Presidency and in Gujarat with the consent of relations to cases in which the widow was the widow of a separated husband; his observations appear to their Lordships to have been general and to apply to either class of cases."

(iii) (1925-1932). In *Ishwar Dadu* v. *Gajabai* (*j*) decided by the Bombay High Court in 1925, it was contended, on the

(*f*) *Ramji* v. *Ghamau* (1879) 6 Bom. 498 [F.B.]; *Dinkar* v. *Ganesh* (1882) 6 Bom. 505 [F.B.].

(*g*) *Vithoba* v. *Bapu* (1891) 15 Bom. 110; *Lakshmibai* v. *Vishnu* (1905) 29 Bom. 410 [consent of father-in-law cannot operate after his death].

(*h*) (1921) 48 I. A. 513, 49 Cal. 1, 64 I. C. 536, ('22) A.PC. 216.

(*i*) (1870) 7 Bom. H.C., Appx. 1.

(*j*) (1925) 50 Bom. 468, 96 I. C. 712, ('26) A. B. 435 [F.B.].

S. 463 basis of the above observations of the Judicial Committee, that the decision in *Ramji* v. *Ghamau* (*k*) and the decisions that followed it were overruled by the Judicial Committee. The question was referred to a Full Bench. The Full Bench held, by a majority of four against one, that the observations of the Judicial Committee were *obiter* and that the earlier decisions of the Bombay High Court beginning with *Ramji* v. *Ghamauk* (*k*) were not overruled. In a later case where the coparcener was still in his mother's womb at the date of adoption, it was held that the adoption was invalid (*l*).

(iv) (After November, 1932). The facts of an appeal which arose from the Dharwar District of Bombay and which was decided by the Judicial Committee in 1932 were these. *N*, *J* and *K* were three brothers of whom *N* and *J* were undivided and *K* was divided from them. *K* died in 1932 leaving a son *G*. *J* died in 1913 leaving his widow *B*. *N* died in 1915 leaving his son *D*. In 1919 *D* died leaving his son *D.T.* who was born in 1918. During the life time of *D.T.*, *J*'s widow, *B*, adopted Narayan in 1919. Afterwards, in 1920 *D.T.* died. *G* brought the suit questioning the validity of Narayan's adoption. The High Court of Bombay, following the Full Bench judgment in *Ishwar Dadu*'s case (*m*) held that the adoption was invalid as the joint family had not ceased and *B* could not adopt without the consent of the sole coparcener (*D.T.*). The Judicial Committee held that *Ramji* v. *Ghamau* (*n*) was overruled by *Yadao*'s case (*o*) and that the decision in *Ishwar Dadu*'s case (*m*) was erroneous and reversing the High Court's judgment held that the adoption was valid (*p*). The rule was regarded as firmly established in a later decision of the Judicial Committee from Bombay (*q*).

The subject-matter of sections 462 and 463 should be carefully distinguished from that of secs. 471 and 472. The former sections deal with the question whether the widow can have a power to adopt when the husband has not given an authority; whereas the latter deal with the question as to how a widow's authority (whether from the husband, or sapindas or inherent as in Bombay) may terminate on the happening of certain events. The latter sections are not confied to Madras and Bombay, but apply to the whole of India.

(*k*) (1882) 6 Bom. 498.
(*l*) *Bala Anna* v. *Akubai* (1926) 50 Bom. 722, 99 I. C. 417, ('26) A. B. 584.
(*m*) (1925) 50 Bom. 468, 96 I.C. 712, ('26) A.B. 435 [F.B.].
(*n*) (1882) 6 Bom. 498.
(*o*) (1921) 48 I. A. 513, 49 Cal. 1, 64 I.C. 536, ('22) A.PC. 216.
(*p*) *Bhimabai* v. *Gurunathgowda* (1933) 57 Bom. 157, 60 I. A. 25, 141 I. C. 9, ('33) A.PC. 1.
(*q*) *Vijaysangji* v. *Shivsangji* (1935) 62 I.A. 161, 59 Bom. 360, 155 I.C. 493, ('35) A.PC. 95; *Dhondi Dnyanoo* v. *Rama Bala* (1936) 60 Bom. 83, 39 Bom. L.R. 94, 161 I.C. 849, ('36) A.B. 132; *Balu Saharam* v. *Lahoo Sambhaji* (1937) Bom. 508 [F.B.], 39 Bom. L.R. 382, 170 I.C. 393, ('37) A.B. 279.

(4) *Case of two widows.*—Where there are two or more widows, the senior widow may adopt without the consent of the junior widow or widows (*r*); but the junior widow cannot adopt without the consent of the senior widow, unless she has an express authority to adopt from her husband (*s*). Where the senior widow relinquished her right of adoption in favour of the junior widow for consideration, an adoption by her on the ground that the junior widow has not exercised the right is invalid (*t*).

If the husband was joint with his father at the time of his death, the junior widow may adopt with the consent of her husband's father, and such adoption is valid even if it is made without the consent of the senior widow (*u*).

As to the termination of the senior widow's power to adopt, when the junior widow has a son who dies and is succeeded by the junior widow as his heir, see sec. 472.

GENERAL RULES AS TO ADOPTION BY WIDOWS.

464. Extent of widow's power to adopt.—A widow has no larger powers of adoption than what her husband would have, if alive (*v*).

Thus a widow cannot adopt so long as there is a son, grandson or great-grandson natural or adopted, of her husband, in existence. See sec. 463 (*1*).

465. Minor widow.—A minor widow may adopt in the same circumstances as an adult widow, provided she has attained the age of discretion and is able to form an independent judgment in selecting the boy to be adopted (*w*).

According to Bengal writers the age of discretion is reached at the beginning of the sixteenth year; according to Benares writers, at the end of the sixteenth year. The former view was taken in a recent Madras case (*x*). All authorities agree in holding that the widow must have attained competence for independent judgment. But no such judgment is required when the boy to be adopted is named by the husband in the authority to adopt. In such a case she can adopt though she has not attained the age of discretion (*y*).

(*r*) *Rakhmabai* v. *Radhabai* (1868) 5 B. H. C. A. C. 181; *Basappa* v. *Sidramappa* (1919) 43 Bom. 481, 50 I. C. 736; *Amava* v. *Mahadgauda* (1898) 22 Bom. 416; *Dundoobai Anandrao* v. *Vithalrao Anandrao* (1936) 60 Bom. 498, 38 Bom. L. R. 193, 162 I.C. 780, ('36) A.B. 182.

(*s*) *Ba Sappa* v. *Sidramappa* (1919) 43 Bom. 481, 50 I.C. 736; *Padajirav* v. *Ramrav* (1889) 13 Bom. 160.

(*t*) *Sadashiv Waman* v. *Reshma* (1938) Bom. 84, 39 Bom. L.R. 1115, 173 I.C. 509, ('38) A.B. 1.

(*u*) *Dnyanu* v. *Tanu* (1920) 44 Bom. 508, 57 I.C. 113.

(*v*) *Gopee Lall* v. *Chundraolee* (1873) 11 Beng. L. R. 391 I. A. Sup. Vol. 131.

(*w*) *Sattiraju* v *Venkataswami* (1917) 40 Mad. 925, 40 I. C. 518 [12 years old cannot adopt]; *Basappa* v. *Sidramappa* (1919) 43 Bom. 481, 50 I.C. 736 [15 years old - can adopt]; *Murgeppa* v. *Kalava* (1920) 44 Bom. 327, 55 I.C. 361 [12 years old-- cannot adopt]; *[illegible]* v. *Fakirnaik* (1922) 46 Bom. 307, 64 I. C. 899, ('22) A. B. 105 [12½ years old—cannot adopt].

(*x*) (1917) 40 Mad. 925, 929, 40 I.C. 518, *supra*.

(*y*) *Mondakini* v. *Adinath* (1891) 18 Cal. 69.

Ss. 466-470

466. Unchaste widow.—(*1*) It has been held that an unchaste widow cannot adopt, even though she may be acting under an express authority from her husband (*z*).

(*2*) In the Bombay Presidency a Sudra widow, though unchaste, may make a valid adoption (*a*).

Sub-sec. (*1*).—Thus it has been held that a widow pregnant by adultery cannot adopt. The reason given is that her irregular life renders her incapable of performing the necessary religious ceremony.

467. Re-marriage of widow.—A widow cannot, after re-marriage, adopt a son to her first husband (*b*).

468. Successive adoptions.—A widow may adopt several sons in succession one after the death of another, unless there is a specific limitation placed on her power to adopt (*c*).

Illustration.

A authorises his wife *B* to adopt a son to him after his death *B* adopts *C*. *C* then dies unmarried. *B* may adopt another son to *A*. The authority to adopt is not exhausted on the adoption of *C*.

In the above case it was argued that by the adoption of the first adopted son, all the spiritual benefit to be derived from the act was secured to the deceased, and that the adoption of a second boy was, therefore, supererogatory. But this contention was rejected by the Privy Council. As to simultaneous adoptions, see sec. 485 below.

469. Motive of adoption.—The motive of a widow in making an adoption is not material upon the question of its validity (*d*). The Court can enquire into the motives of the husband's sapindas in giving [s. 462(*6*)] or refusing consent to an adoption to a widow (*e*).

Money paid to a widow to induce her to adopt a son is in the nature of a bribe, which is condemned by all *smriti* writers as an illegal payment (*f*).

470. Co-widows.—Where a Hindu dies leaving two or more widows, the adoption by the widows, where an express authority is left by the husband to adopt, is governed by the

(*z*) *Sayamalal* v. *Saudamini* (1870) 5 Beng. L. R. 362.

(*a*) *Basvant* v. *Mallappa* (1921) 45 Bom. 459, 59 I. C. 800, ('21) A.B. 301.

(*b*) *Panchappa* v. *Sanganbasawa* (1900) 24 Bom. 89, 94; *Fakirappa* v. *Savitrewa* (1921) 23 Bom. L. R. 482, 62 I.C. 318, ('21) A.B.1 [F.B.].

(*c*) *Suryanarayana* v. *Venkataramana* (1906) 29 Mad. 382, 33 I.A. 145; *Yadao* v. *Namdeo* (1921) 48 I.A. 513, 49 Cal. 1, 64 I.C. 536, ('22) A.PC. 216.

(*d*) *Ramchandra* v. *Mulji* (1898) 22 Bom. 558 [F.B.]; *Mahableshwar* v. *Durgabai* (1898) 22 Bom. 199. See also *Raja Mukund Deb* v. *Sri Jagannath* (1923) 2 Pat. 469, 485-486, 72 I.C. 230, ('23) A. P. 423; *Kandulapati Kanakaratnam* v. *Kandulpati Narasimha Rao* (1942) Mad. 173, 198 I.C. 236, ('41) A. M. 937 [F.B.].

(*e*) *Rajah Vellanki* v. *Venkata* (1876) 1 Mad. 174, 190-191, 4 I.A. 1, 14; *Krishnayya Rao* v. *Raja of Pitapur* (1928) 51 Mad. 893, 116 I.C. 673, ('28) A. M. 994 [F.B.].

(*f*) *Shri Sitaram* v. *Harihar* (1911) 35 Bom. 169, 8 I. C. 625.

rules laid down in section 455 above. Where no such authority is given, the adoption by the widows in Madras is governed by the rule laid down in section 462, sub-section (*3*) and in Bombay by the rule laid down in section 463, sub-section (*3*). Ss. 470,471

The only schools which allow an adoption by a widow without her husband's authority are the Dravida (Madras) school and the Maharashtra or Maharatta (Bombay) school.

TERMINATION OF WIDOW'S POWER TO ADOPT.

471. Generally.—(*1*) A widow's power to adopt continues all her lifetime—

(i) in all cases where her husband has died without leaving any son [see *explanation I* and ills. (a) to (c)];

(ii) in cases where her husband has left a son, if the son dies leaving her (his mother) as his nearest heir (*g*) [ills. (d) and (e)].

In the first case, the widow succeeds to the estate as her husband's heir; in the second case, she succeeds to the estate as the heir of her son (*i.e.*, as his mother). In either case, the estate vests in her, in the one case immediately on the death of her husband, in the other case, immediately on the death of her son. By adoption she divests no estate except her own. But vesting or divesting is no longer of importance. See *Amarendra Mansingh's* case. See also the Hindu Women's Rights to Property Act, 1937, under which it seems the adopted son will now take a moiety of the interest which vests in the adopting widow.

In the second case, the mere fact that the son had attained majority (which would be at the age of eighteen), or had attained ceremonial competence (which would be at the age of fifteen), does not extinguish the widow's power to adopt to her husband (*h*).

(*2*) (a) If the son dies leaving a son or a wife, the widow's power to adopt comes to an end *at his death*, and she cannot thereafter exercise it, though she may have been expressly authorized by her husband to adopt in the event of the son's

(*g*) *Verabhai* v. *Bai Hiraba* (1903) 30 I. A. 234, 27 Bom. 492; *Gaidappa* v. *Girimallappa* (1895) 19 Bom. 331; *Mallappa* v. *Hanmappa* (1920) 44 Bom. 297, 55 I.C. 814.

(*h*) *Tripuramba* v. *Venkataratnam* (1923) 46 Mad. 423, 72 I.C. 156, ('23) A. M. 521; explaining *Madana Mohana* v. *Purushothama* (1918) 45 I. A. 156, 41 Mad. 855, 46 I.C. 481; *Venkappa* v. *Jiraji* (1901) 25 Bom 306; *Kannepalli Suryanarayana* v. *Venkataramana* (1906) 33 I.A 145, 154, 29 Mad. 382, [illegible] 390, *Verabhai* v. *Bai Hiraba supra*; *Anprabai* v. *Pandurang* (1924) 48 Bom. 492, 80 I.C. 185, ('24) A.B. 4[illegible], *Shashankbhooshan Chaudri* v. *Brajendranarayan Mandal* (1936) 63 Cal. 385, 159 I.C. 437, ('35) A.C. 716.

S. 471 death. The reason is that the estate then vests in an heir of the deceased son and the widow cannot adopt to her husband so as to devest the estate taken by that heir (*i*) [ills. (f) and (g)]. In a recent Privy Council decision the true reason is said to be that "where the duty of providing for the continuance of the line which was upon the father, and was laid by him conditionally upon the mother, has been assumed by the son and by him passed on to a grandson or to the son's widow, the mother's power is gone" (*j*).

(b) If the son dies leaving a daughter, it has been held in Bombay that the adoption is valid (*k*).

(c) If the son is a step-son of the widow having the power to adopt and dies leaving his own mother (or, the mother having predeceased him, grandmother) it was held (before *Amarendranath Singh*'s case) that the adoption was invalid (*l*). But as the son's mother or grandmother cannot discharge the duty of providing for the continuance of the line, these decisions cannot be supported.

(*3*) It was formerly held that the power to adopt once it comes to an end becomes extinguished for ever, and it does not revive even when, on the death of the son's nearer heirs, the estate reverts to the widow and becomes vested in her (*m*). The question arises whether, after *Amarendra Mansingh*'s case these decisions are good law. In a recent case in Nagpur it was held that on the remarriage of the son's widow the property came back to the mother and then the mother could adopt—the power being only suspended and not extinguished [Ill. (f)].

(*4*) Subject to the above provisions a widow may adopt at any time she pleases, unless there is a direction to the contrary (*n*). Thus in one case an adoption made by a widow seventy-one years after her husband's death was upheld (*o*).

(*i*) *Mst. Bhoobun Moyee* v. *Ram Kishore* (1865) 10 M.I.A. 279, *Padma Kumari* v. *Court of Wards* (1882) 8 Cal. 302, 8 I.A. 229, *Thayammal* v. *Venkatarama* (1887) 10 Mad. 205, 14 I.A. 67; *Tarachurn* v. *Sureshchunder* (1890) 17 Cal. 122, 16 I.A. 166; *Amara* v. *Mahadgauda* (1898) 22 Bom. 416; *Ramkrishna* v. *Shamrao* (1902) 26 Bom. 526 [F.B.]; *Anandibai* v. *Kashibai* (1904) 28 Bom. 461; *Faizuddin* v. *Tincowri* (1895) 22 Cal. 565.

(*j*) *Amarendra Mansingh* v. *Sanatan Singh* (1933) 12 Pat. 642, 60 I.A. 242, 143 I.C. 441, ('33) A.PC. 155.

(*k*) *Chambasappa* v. *Madiwalappa* (1937) Bom. 642, 39 Bom. L.R. 591, 170 I.C. 999, ('37) A.B. 337.

(*l*) *Anandibai* v. *Kashibai* (1904) 28 Bom. 461; *Faizuddin* v. *Tincowri* (1895) 22 Cal. 565; *Drobomoyee* v. *Shama Churn* (1886) 12 Cal. 246.

(*m*) *Krishnarao* v. *Shankarrao* (1893) 17 Bom. 164; *Ramkrishna* v. *Shamrao* (1902) 26 Bom. 526; *Manikamala* v. *Nandakamar* (1906) 33 Cal. 1306.

(*n*) *Giriowa* v. *Bhimaji* (1885) 9 Bom. 58; *Mutasaddi* v. *Kundan Lal* (1905) 28 All. 377, 33 I.A. 55.

(*o*) *Raje* v. *Jayavantrav* (1867) 4 Bom. H.C. A.C. 191.

(5) The provisions of this section apply to all cases governed by the Dayabhaga law, whether the husband was divided or undivided at the time of his death, and to those cases governed by the Mitakshara law where the husband was divided at the time of his death. The next section applies to cases governed by the Mitakshara law, where the husband was undivided at the time of his death. **S. 471**

Explanation I.—"Son" in this section means a son, grandson, or great-grandson, natural or adopted.

Explanation II.—A son adopted by a widow to her husband after his death is a son left by the husband within the meaning of sub-section (*1*), cl. (ii) [see ill. (d)].

Illustrations.

(a) *A* dies leaving a widow as his only heir. The widow may adopt a son to *A*. [Sub-sec. (*1*), cl. (i)].

(b) *A* dies leaving a widow and a daughter. The widow may adopt a son to *A*. It does not matter that *A* has left a daughter. The daughter is not entitled to succeed until after the widow, and she has no voice in the matter of the adoption. [Sub-sec. (*1*), cl. (i)].

(c) *A* dies leaving two widows in whom his property vests as his heirs. The widow having authority to adopt or, in Bombay, the senior widow without any authority adopts without the consent of the co-widow. The adoption is valid (*p*).

(d) *A* dies leaving a widow *W* and a son. On *A*'s death, the son succeeds to the estate. The son then dies unmarried. On his death, *W* succeeds to his estate as his heir (*i.e.*, as his mother). *W* may adopt a son either under an authority from *A* (*q*) or in Madras, with the consent of *A*'s *sapindas* (*r*), or in Bombay, without any authority.

In the above case, if the adopted son dies unmarried, *W* may again adopt with proper authority, if necessary, or in Bombay without authority (*s*).

(d1) *A* dies leaving a widow and two sons. The sons die successively. The mother's power to adopt does not come to an end and she can adopt.

(d2) If in the above case one son dies married then a few days later his widow dies and then the second son dies, the mother's authority to adopt is not terminated and she can adopt (*t*).

(e) *A* dies leaving a widow and a grandson *B*. On *A*'s death, *B* succeeds to the estate as *A*'s grandson. *B* then dies without leaving any wife or children. On *B*'s death, the widow succeeds to the estate as *B*'s grandmother. The widow may adopt a son to her husband *A*: *Narhar* v. *Balwant* (1924) 48 Bom. 559, 80 I.C. 435, ('24) A.B. 437. But if *B* dies leaving a wife or child, the widow's power to adopt comes to an end. [Sub-sec. (*1*), cl. (ii)—also Expln. I].

(*p*) *Mandakini* v. *Adinath* (1891) 18 Cal. 69; *Rakmabai* v. *Radhabai* (1868) 5 Bom. H.C.A.C. 181.

(*q*) *Amarendra Mansingh* v. *Sanatan Singh* (1933) 12 Pat. 642, 60 I.A. 242, 143 I.C. 441, ('33) A.PC. 155.

(*r*) *Raja Vellanki* v. *Venkata Rama* (1876) 1 Mad. 174, 190-191, 4 I.A. 1, 14.

(*s*) *Ram Soondur* v. *Surbanee Dossee* (1874) 22 W.R. 121.

(*t*) *Anant Govind* v. *Dnyaneshwar Balkrishna* (1944) Bom. 218.

Ss. 471, 472

(f) *A* dies leaving a widow and a son *B*. On *A*'s death the estate vests in *B*. *B* dies leaving his wife *C* who succeeds to the estate. *A*'s widow then adopts a son to *A* during the lifetime of *C*,

(i) under the authority of husband—*Chunderbulle*'s case (*u*).

(ii) (in Madras) with the assent of *A*'s *sapindas*—*Thayammal* v. *Venkatrama* (*v*).

(iii) (in Bombay) under her inherent power—*Keshab* v. *Gobind* (*w*).

In all the above cases, the adoption is invalid.

Even if *B* is an adopted son, the same result follows (*x*).

Even if the widow adopts after *C*'s death, it has been held by the Bombay High Court that the adoption is invalid, because the widow's power to adopt was at an end when the estate devolved on *C* (*y*), but this is in conflict with a recent decision of the Nagpur High Court (*z*). In that case a Hindu died leaving his widow and son. The son died leaving his widow who then remarried. The mother then adopted. It was held that adoption was valid (*z*).

(g) *A* dies leaving a widow *W* and a son *B*. On *A*'s death, *B* succeeds to the estate. *B* then dies leaving a son *C*. On *B*'s death, *C* succeeds to the estate as *B*'s son. *C* dies unmarried leaving *W*, his grandmother, as his next heir. On *C*'s death his estate vests in *W* as his heir. *W* then adopts a son to *A*. The adoption is not valid for the reasons stated in ill. (f) : *Ramakrishna* v. *Shamrao* (1902) 26 Bom. 526, approved in *Madana Mohana* v. *Purushothama* (1918) 45 I.A. 156, 41 Mad 855, 46 I.C. 481, cited in illustration (f) above. In this case also it is clear that the widow would not, by adoption, divest any estate but her own. [Sub-sec. (*3*)].

The decision in *Kumud* v. *Ramesh* (1919) 46 Cal. 749, 49 I.C. 609 cannot be regarded as good law.

The subject-matter of this section is closely connected with another subject, namely, divesting of estate by adoption, as to which see sec. 502. As to adoption by a widow with the consent of the person in whom the estate is vested, see sec. 503 below.

472. Is there a limit to the power of the widow to adopt when the husband was a member of the joint family at the time of his death ?—(1) So long as there is a male member in the coparcenary the power to adopt does not terminate and the adoption is valid [Ills. (a), (b) and (c)].

(2) It was at one time supposed that where the last surviving coparcener died and the property passed to his heir, such as a widow or collateral, the power of the widow of a predeceased coparcener was at an end (*a*). But it is now definitely settled that such cases must be regarded as overruled by the decision of the Privy Council in *Anant* v. *Shankar* (*b*).

(*u*) *Bhoobun Moyee* v. *Ram Kishore* (1865) 10 M.I.A. 279; *Pudma Kumari* v. *Court of Wards* (1881) 8 I A. 229, 8 Cal. 302.

(*v*) (1887) 10 Mad. 205, 14 I.A. 67.

(*w*) (1884) 9 Bom. 94.

(*x*) *Madana Mohana* v. *Purushothama* (1918) 45 I.A. 156, 41 Mad. 855, 46 I.C. 481.

(*y*) *Krishnarao* v. *Shankarrao* (1893) 17 Bom. 164; *Manickamala* v. *Nandakumar* (1906) 33 Cal. 1306.

(*z*) *Bapuji* v. *Gangaram* (1941) Nag. 178, 195 I.C. 282, ('41) A. N. 116.

(*a*) *Chandra* v. *Gojarabai* (1890) 14 Bom. 463; *Adivi Suryaprakasarao* v. *Nidamarty Gangaraju* (1910) 33 Mad. 228.

(*b*) (1944) Bom. 116.

Illustrations.

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(a) *A* and *B* are undivided brothers governed by the Mitakshara law. *A* dies leaving authority to his widow to adopt a son to him. On *A*'s death his undivided half share in the coparcenary property passes to *B*, the surviving coparcener. While *B* is still alive, *A*'s widow adopts a son to *A*. The effect of the adoption is that a coparcenary interest is created in the joint property co-extensive with that which *A* has in the property (that is, one-half), and it vests in the adopted son (*c*).

(b) *A* and *B*, two brothers, are members of a joint family. *A* dies leaving a widow who is pregnant at the time of his death. *B* then dies leaving a will whereby he authorizes his widow to adopt a son to him. The day next after *B*'s death, *A*'s widow is delivered of a son. After three months *B*'s widow adopts a son to *B*. The adoption is valid, and *A*'s son and the adopted son will take the property as coparceners (*d*). See ill. (b) to s. 497.

(c) Where one branch of a joint family divided amongst themselves and the widow of another branch of the family being its sole surviving member made an adoption it was held that the adoption was valid and the adopted boy was entitled to reopen the partition as a step towards getting his own share (*e*).

The Nagpur High Court has held that adoptions by two widows of the members of the joint family after the death of all the male members are valid (*f*).

In applying the above principle to impartible estates, it must be remembered that such an estate is a species of coparcenary even though the junior members are not entitled to enjoy the property or to demand a partition or to prevent alienation. (*See* s. 587.)

Illustrations.

(d) *A*, the zemindar of the impartible estate of Chinnakimidy in Madras, died leaving his brother *R* and a widow *K*. The widow adopted *B* under the authority of her husband. The adoption is valid though the zemindary was not vested in her. The result of the adotpion is that a new coparcener is introduced into the senior line. The adopted son divests *R* and becomes zemindar. The last result is a special result on account of the impartibility of the estate (*g*).

(e) *B*, the zemindar of Dompara Raj in Orissa who had previously in 1898 given to his widow an authority to adopt, died in 1903. In 1902 a son *C* was born to him. *C* succeeded his father and died in 1922 unmarried. *B*'s widow then adopted. At the time of *C*'s death, there was a junior branch in whom the zemindary was vested. The Judicial Committee reversing the judgment of the Patna High Court, held that the adoption was valid (*h*).

(f) *C*, the talukdar of the impartible estate of Ahima in Bombay, died in 1899 leaving his brother *B*, his son *D* and his widow *K*. In 1915, *D* was given away in adoption and then *K* adopted *M* in 1917. The Judicial Committee reversing the judgment of the High Court held that the adoption was valid (*i*).

(g) *K*, a junior member of the family of the Thakore of Gumph in Bombay, while in possession of a village granted to his ancestors, a *jivai* grant for maintenance on condition that it should revert to the Thakore on failure of the male line, died in 1903 leaving

(*c*) *Surendra Nandan* v. *Sailaja*, *supra*.

(*d*) *Bachoo* v. *Mankorebai*, *supra*.

(*e*) *Bajirao* v. *Ramkrishna* (1941) Nag. 707, 198 I.C. 581, ('42) A. N. 19.

(*f*) *Mst. Draupadi* v. *Vikram* (1939) Nag. 88.

(*g*) *Raghunada* v. *Brozo Kishoro* (1876) 1 Mad. 69, 3 I.A. 154.

(*h*) *Amarendra Mansingh* v. *Sanatan Singh* (1933) 12 Pat. 642, 60 I.A. 242, 143 I.C. 441, ('33) A.PC. 155.

(*i*) *Vijaysangji* v. *Shivsangji* (1935) 37 Bom.L.R. 562, 155 I.C. 498, ('35) A.PC. 95 reversing the judgment of the High Court.

a widow *D*. *D* adopted *P* in 1904. Reversing the judgment of the High Court, the Judicial Committee held that the adoption was valid and that the Thakore was not entitled to the village. They considered the case to be similar to the Borhampore case thus implying that the village held in *jivai* grant must be regarded as the joint family property of both the branches though in actual enjoyment of the junior branch (*j*).

Watan property.—*A*, a watandar in Bombay, died leaving a widow. She adopted a son *C*. *C* then died and the watan devolved on a collateral *G*. *G* then gave his son *S* in adoption to the widow. *S* died leaving daughters. The widow then made a third adoption. It was held that the widow's power to adopt was not extinguished by reason of the watan vesting in *G* or by reason of *S*'s leaving daughters (*k*). In the light of *Bimabai*'s case (*l*) and this decision, the decision in *Bhimabai* v. *Tayappa* (1913) 37 Bom. 598 must be regarded as overruled.

A Hindu died leaving his widow *G* and son *K*. *K* then died and the watan property of the family passed to a remote collateral *S*. The widow *G* then adopted a son. The Privy Council held that the adoption was valid and divested *S* of the watan properties (*m*) overruling the full bench decision of the Bombay High Court (*n*).

A similar decision had been previously arrived at by the Bombay High Court (*o*).

473. Adoption by widow succeeding as gotraja sapinda in Bombay.– An adoption by a widow which is *prima facie* valid cannot be affected by the fact that certain property has devolved upon her as gotraja sapinda of the last male holder. In such a case though the adoption itself is valid it cannot affect the course of devolution of the property she obtained as a gotraja sapinda (*p*).

Illustration.

On the death of the last male coparcener in a joint family the property passed to his mother; after her, to his grandmother, and after her, to his paternal uncle's widow who then adopted. The Full Bench of the Bombay High Court held that though the adoption is valid, it has no effect on the course of devolution of the property (*p*).

II.– PERSONS LAWFULLY CAPABLE OF GIVING IN ADOPTION.

474. Who may give in adoption.—The only persons who can lawfully give a boy in adoption are his father and his mother (*q*).

(*j*) *Pratapsing* v. *Agarsingji* (1919) 46 I.A. 97, 43 Bom. 778, 50 I.C. 457.

(*k*) *Chambasappa* v. *Madiwalappa* (1937) Bom. 642, 39 Bom. L.R. 591, 170 I.C. 999, ('37) A.B. 337.

(*l*) (1933) 57 Bom. 157, 60 I.A. 25, 141 I.C. 9, ('33) A.PC. 1.

(*m*) *Anant Bikkappa* v. *Shanker Ramachandra* (1944) Bom. 116, 70 I.A. 232 (1943) A.PC. 196.

(*n*) *Balu Sakaram* v. *Lahu Sambhaji* (1937) Bom. 508 [F.B.], ('37) A.B. 279. The cases of *Tejrani* v. *Sarupchand* (1920) 44 Bom. 483, 55 I.C. 96 and *Irappa Lokappa* v. *Rachayya Mudiallayya* (1940) Bom. 42, 187 I.C. 504, 41 Bom. L.R. 1300, ('40) A.B. 118 must be regarded as overruled.

(*o*) *Lingappa Rayappa* v. *Kadappa Bapurao* (1940) Bom. 721, 191 I.C. 504, ('41) A.B. 345.

(*p*) *Krishnaji Raghunath* v. *Rajaram Trimbak* (1938) Bom 679, ('38) A.B. 383 [F.B.]; *Madhav Sang Haribhai* v. *Dipoany Jijibhai* (1942) Bom. 812, 203 I.C. 339, ('42) A.B. 309, 44 Bom. L.R. 678.

(*q*) *Putlabai* v. *Mahadu* (1909) 33 Bom. 107, 1 I.C. 659.

Thus one *brother* cannot give another brother in adoption. Similarly a *step-mother* cannot give her stepson in adoption. Nor can a *grandfather* give his grandson in adoption. A woman is incompetent to give in adoption her illegitimate son, born of adulterous intercourse (*r*).* Ss. 474-478

475. Right of father.—The primary right to give in adoption is that of the father (*s*).

476. Right of mother.—(*1*) The mother cannot give her son in adoption, while the father is alive and capable of consenting, without his permission. But she may do so, if he has become incapable of giving his consent, or if he has renounced worldly affairs and entered a religious order, or after his death, provided there be no express or implied prohibition from him (*t*).

(*2*) It has been held by the High Court of Bombay that a widow has no power after her remarriage to give in adoption her son by her first husband, unless she has been expressly authorized by him to do so (*u*). In a later case, the same High Court expressed the opinion that remarriage did not deprive a widow of her right to give such son in adoption (*v*).

477. Delegation of power.—The *power* to give a boy in adoption belongs exclusively to his parents, and it can be exercised by them alone. Neither parent, therefore, can delegate that power to another person (*w*). But the *physical act* of giving the son in adoption may be delegated to another, as such an act involves no exercise of discretion (*x*).

478. Renunciation of Hindu religion.—A Hindu father, who has become a convert to Mahomedanism, does not, by reason of his conversion, lose his power of giving his son, who has remained a Hindu, in adoption. But since the *physical* act of giving a son in adoption is accompanied by religious ceremonies, such act must be delegated to another person who is a Hindu (*x*).

This decision is based on the provisions of the Caste Disabilities Removal Act, 1850.

(*r*) *Tirkangauda Mallangauda* v. *Shivappa Patil* (1943) Bom. 706, 45 Bom. L.R. 992, ('44) A.B. 40; *Apya Shethya* v. *Rumnakka Apya* (1941) Bom. 350, 196 I.C. 42, ('41) A.B. 222, 43 Bom. L.R. 314.

(*s*) See *Narayanasami* v. *Kuppusami* (1888) 11 Mad. 43 at p. 47.

(*t*) *Jogesh Chandra* v. *Nrityakali* (1903) 30 Cal. 965; *Raja Makund Deb* v. *Sri Jagannath* (1923) 2 Pat. 469, 72 I.C. 230, ('23) A.P. 423.

(*u*) *Punchappa* v. *Sanganbasawa* (1900) 24 Bom. 89.

(*v*) *Putlabai* v. *Mahadu* (1909) 33 Bom. 107, 1 I.C. 657.

(*w*) *Bashetiappa* v. *Shivlingappa* (1873) 10 B.H.C. 268.

(*x*) *Shamsing* v. *Santabai* (1901) 25 Bom. 551.

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*A Brahmo can give his Brahmo son in adoption. A Brahmo does **not cease** to be a Hindu by becoming a member of the Brahmo Samaj (y).*

479. Mental capacity.—The person giving in adoption must have attained the age of discretion, and must be of sound mind (*z*).

479A. Consent of Government.—It is not necessary to validate an adoption that the consent of the Government should have been obtained (*a*).

III. PERSONS WHO MAY BE LAWFULLY TAKEN IN ADOPTION.

480. Who may be adopted.—Subject to the following rules, any person who is a Hindu (*b*), may be taken or given in adoption:—

(1) the person to be adopted must be a male (*c*);

(2) he must belong to the same caste as his adopting father; thus a Brahman cannot adopt a Kshatriya, a Vaisya or a Sudra; it is not necessary that he should belong to the same sub-division of the caste (*d*);

(3) he must not be a boy whose mother the adopting father could not have legally married (*e*); but in Bombay this rule has been restricted in recent cases to the daughter's son, sister's son, and mother's sister's son (*f*). This prohibition, however, does not apply to Sudras (*g*). Even as to the three upper classes, it has been held that an adoption, though prohibited under this rule, may be valid, if sanctioned by custom (See '*custom*' below).

(3A) A deaf and dumb person cannot be adopted (*h*).

(y) *Kusum Kumari* v. *Satya Ranjan* (1903) 30 Cal. 999.

(z) *Bireswar* v. *Ardha Chander* (1892) 19 Cal. 452, 461, 19 I.A. 101, 105-106.

(a) *Ramchandra* v. *Nanaji* (1871) 7 Bom. H.C. (A.C.) 26; *Narhar* v. *Narayan* (1877) 1 Bom. 607.

(b) See ss. 6 and 7, and (1903) 30 Cal. 999, *supra*.

(c) *Gangabai* v. *Anant* (1889) 13 Bom. 690.

(d) *Shib Deo* v. *Ram Prasad* (1924) 46 All. 637, 87 I.C. 938, ('25) A.A. 79.

(e) *Minakshi* v. *Ramanada* (1888) 11 Mad. 49; *Bhagwan Singh* v. *Bhagwan Singh* (1899) 21 All. 412, 418, 26 I.A. 153, 160; *Haridas Chatterji* v. *Manmatha Nath Mallik* (1937) 2 Cal. 265, 160 I.C. 332, ('36) A.C. 1.

(f) *Ramchandra* v. *Gopal* (1908) 32 Bom. 619; *Ramkrishna* v. *Chimnaji* (1913) 15 Bom. L.R. 824, 21 I.C. 34.

(g) See s. 635, (1) *Raj Koomar* v. *Bissessur* (1884) 10 Cal. 688; *Lakshmappa* v. *Ramava* (1875) 12 Bom. H. C. 364; *Kahandas* v. *Jivan* (1923) 25 Bom. L. R. 510, 73 I.C. 1023, ('23) H.B. 427; *Subrao* v. *Radha* (1928) 52 Bom. 497, 113 I.C. 497, ('28) A. B. 295; *Bhagwan Singh* v. *Bhagwan Singh* (1899) 21 All. 412, 418, 26 I. A. 153, 160; *Chinna* v. *Vedda* (1876) 1 Mad. 62; *Maharaja of Kolhapur* v. *Sundaram* (1925) 48 Mad. 1, 93 I. C. 705, ('25) A.M. 497.

(h) *Surendra Narayan Sarbhadhikari* v. *Bholanath Ray Chaudhri* (1944) 1 Cal. 139.

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(4) there is a difference of opinion between the schools as to the age when a boy may be adopted :—

(i) in Bengal, Benares, Bihar and Orissa, the adoption must be before *upanayana*, that is before the boy is invested with the sacred thread (*i*); it is immaterial that the adopted boy is older than the adopter (*j*);

(ii) the above rule applies also in the Madras Presidency; but if the person to be adopted is of the same gotra as the adopter, the adoption may be made even after *upanayana*, provided it is made *before marriage* (*k*). Among the Lingayits of North Kanara a married man cannot be adopted as the law of the Madras Presidency is applicable to them (*l*);

(iii) in the Bombay Presidency, a person may be adopted at any age, though he may be older than the adopter and though he may be married and have children (*m*).

(5) It has been held in Madras (*n*), Nagpur (*o*) and Allahabad (*p*) that the adoption of a married person is not valid even among Sudras.

Relationship of adoptive father to natural mother : (*Sub-section 3*).—The rule laid down in sub-sec. (*3*) refers to the relationship of the parties *prior* to marriage (*q*). It is founded upon the fiction "that the adopting father has begotten the boy upon his natural mother therefore it is necessary that she should be a person who might lawfully have been his wife." For this reason a man cannot adopt his daughter's son, or his sister's son, or his mother's sister's son, for he cannot marry his daughter, his sister, or his mother's sister; such an adoption cannot be validated by the application of the doctrine of *factum valet* (*r*). If the prohibition referred to above were to be interpreted literally, there would be many other relations incapable of being adopted. But this prohibition has been confined in recent cases to the specific cases of the daughter's son, sister's son, and

(*i*) *Ganga Sahai* v. *Lekhraj* (1887) 9 All. 253. 328; *Sri Raja Makund Deb* v. *Sri Jagannath* (1923) 2 Pat. 469, 72 I.C. 230, ('23) A.P. 423; *Chandreshwar* v. *Bisheshwar* (1926) 5 Pat. 777, 101 I.C. 289, ('27) A.P. 61; *Sura Bala Devi* v. *Sudhir Kumar Mukherji* (1944) 1 Cal. 500.

(*j*) (1926) 5 Pat. 777, 101 I.C. 289, ('27) A.P. 61, *supra*.

(*k*) *Viraragava* v. *Ramalinga* (1886) 9 Mad. 148 [F.B.]; *Pichuvayyan* v. *Subbayyan* (1890) 13 Mad. 128.

(*l*) *Dattatraya Maruti* v. *Laxman Jutippa* (1942) Bom. 584, 203 I.C. 139, ('42) A.B. 260.

(*m*) *Balabai* v. *Mahadu* (1924) 48 Bom. 387, 80 I.C. 529, ('24) A.B. 349. See also *Dharma* v. *Ramkrishna* (1886) 10 Bom. 80; *Gopal* v. *Vishnu* (1899) 23 Bom. 250.

(*n*) *Vithilinga* v. *Vijayathammal* (1883) 6 Mad 43; *Pichuvayyan* v. *Subbayyan* (1890) 13 Mad. 128, 129, *Lingayya* v *Chengalammal* (1925) 48 Mad. 407, 89 I.C. 923, ('25) A.M. 272.

(*o*) *Himoti Bai* v. *Manohar Singh* (1945) Nag. 425.

(*p*) *Jhunka* v. *Nathu* (1913) 35 All. 263, 18 I.C. 960.

(*q*) *Sriramulu* v. *Ramayya* (1881) 3 Mad. 15.

(*r*) *Bhagwan Singh* v. *Bhagwan Singh* (1899) 21 All. 412, 26 I.A. 153, *Walbai* v. *Heerbai* (1910) 34 Bom. 491, 4 I.C. 277 [mother's sister's son cannot be adopted, though he may also happen to be father's brother's son], *Ishwari Prasad* v. *Rai Hari Prashad* (1927) 6 Pat. 506, 106 I. C. 620, ('27) A.P. 145.

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mother's sister's son, and it has been held that it does not extend to other relations. It has thus been held that a Hindu may adopt his half-brother (*s*), his brother's son's son (*t*), his paternal uncle's son (*u*), his father's first cousin (*v*), his wife's brother (*w*), his wife's brother's son (*x*), his wife's sister's son (*y*), his father's sister's son (*z*), or his daughter's husband (*a*). In a Patna case, where a widow was authorised by her husband to take his step-brother in adoption, with liberty to her to adopt another boy if there was "any obstacle to take the step-brother in adoption according to the Shastras," it was held that the "Shastras" included the Dattaka Mimansa, and since the Dattaka Mimansa prohibited the adoption of a step-brother, the widow was justified in not adopting him and in adopting another boy, even though the adoption of a step-brother was sanctioned by judicial decisions (*b*).

A widow adopting to her husband has no larger power than the husband had to adopt. Thus she cannot adopt her husband's daughter's son or his sister's son or his mother's sister's son, these being persons whom the husband himself could not have adopted. At the same time her power of adoption is not less extensive than that of her husband. Thus she may adopt her husband's brother as the husband himself could have done (*c*). Similarly she may adopt her own brother's son as the husband himself could have done. The adoption is not invalid on the ground that she could not have been lawfully married to her own brother. The rule that no one can be adopted as a son, whose mother the adopter could not have legally married does not apply *e converso* (*d*).

Custom.—An adoption, though prohibited by the rule laid down in sub-sec. (*3*), may be valid, if recognized by custom. Thus the adoption of a daughter's son, though prohibited by this rule, has been held to be valid among the Deshastha Smartha Brahmans of the Southern Mahratta Country (*e*). The adoption of a daughter's son is also recognized by custom among Telugu Brahmans in the Madras Presidency (*f*), and among Khatris of Amritsar (*g*); also the adoption of a brother's daughter's son, a daughter's son and a sister's son among Tamil Brahmins (*h*); of a brother's daughter's son among South Kanara Rajputs (*i*); and of a sister's son among the Bhora Brahmans of United Provinces (*j*).

The basis of the rule being that marriage between agnates is prohibited, wherever the basis is ignored in the most prominent cases, namely, the sister's son and the daughter's son, it is submitted that the rule must be regarded as destroyed by the exceptions, in all cases where the adopted boy's mother is an agnate of the adopter.

Factum valet.—See notes under the same head to sec. 434 above.

481. Only son.—An only son may be given and taken in adoption (*k*).

Factum valet.—See notes under the same head to sec. 434 above.

(*s*) *Gajanan* v. *Kashinath* (1915) 39 Bom. 410, 28 I.C. 978, ('15) A.B. 99.
(*t*) *Haran Chunder* v. *Hurro* (1881) 6 Cal. 41.
(*u*) *Virayya* v. *Hanumanta* (1891) 14 Mad. 459.
(*v*) *Mallappa* v. *Gangava* (1919) 43 Bom. 209, 49 I.C. 517, ('19) A.B. 85.
(*w*) *Rure Bhudr* v. *Roopshunkur* (1823) 2 Bor. R. 656.
(*x*) *Sri Ramulu* v. *Ramayya* (1881) 3 Mad. 15.
(*y*) *Ragavendra* v. *Jayaram* (1897) 20 Mad. 283.
(*z*) *Ramkrishna* v. *Chimnaji* (1913) 15 Bom. L. R. 824, 21 I.C. 34.
(*a*) *Sitabai* v. *Parvatibai* (1923) 47 Bom. 35, 69 I.C. 172, ('22) A. B. 239.
(*b*) *Rajendra Prasad* v. *Gopal Prasad* (1928) 7 Pat. 245, 108 I.C. 545, ('29) A.P. 51.
(*c*) *Shripad* v. *Vithal* (1925) 49 Bom. 615, 89 I.C. 197, ('25) A. B. 399.
(*d*) *Bai Nani* v. *Chunilal* (1898) 22 Bom. 973; *Jai Singh* v. *Bijai Pal* (1905) 27 All. 417; *Puttu Lal* v. *Parbati Kunwar* (1915) 42 I.A. 155, 37 All. 359, 29 I.C. 617, ('15) A.PC. 15.
(*e*) *Sundrabai* v. *Hanmant Gurnath* (1932) 56 Bom. 298, 140 I.C. 235, ('32) A.B. 398.
(*f*) *Viswasundara* v. *Somasundara* (1920) 43 Mad. 876, 59 I.C. 609, ('20) A.M. 451.
(*g*) *Parmanand* v. *Shiv Charan* (1921) 2 Lah. 69, 59 I.C. 256, ('21) A.L. 147; *Roshan Lal* v. *Samar Nath* (1938) Lah. 173, ('37) A.L. 626.
(*h*) *Vaydinada* v. *Appu* (1886) 9 Mad. 44.
(*i*) *Sooratha* v. *Kanaka* (1920) 43 Mad. 867, 59 I.C. 585, ('20) A.M. 648.
(*j*) *Chain Sukh Ram* v. *Parbati* (1892) 14 All. 53.
(*k*) *Sri Balusu Gurulingaswami* v. *Sri Balusu Ramalakshmamma* (1899) 22 Mad. 398, 26 I.A. 113; *Vyas* v. *Vyas* (1900) 24 Bom. 367; *Krishna* v. *Paramshri* (1901) 25 Bom. 537.

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482. Orphan.—The adoption of an orphan is not valid (*l*), except by custom (*m*).

The reason of the rule is that a boy can be given in adoption only by his father or his mother, which cannot be done in the case of an orphan. The doctrine of *Factum valet* cannot be invoked to validate such an adopton (*n*).

483. Stranger.—A stranger may be adopted though there are near relations (*o*).

Factum valet.—See notes under the same head to sec. 434 above.

484. Adoption of same boy by two persons.—Two persons cannot adopt the same boy, even if the persons adopting are brothers. In such a case, the adoption by each of them is invalid (*p*).

485. Simultaneous adoptions.—The simultaneous adoption of two or more persons is invalid as to all (*q*).

Illustration.

A has two wives, *B* and *C*, but has no son. *A* being desirous to give a son to each of them authorizes them to adopt two sons simultaneously, one to be adopted by *B* and the other by *C*. The authority to adopt is invalid, and the adoptions (if any) made pursuant to such authority are also invalid.

Sastri G. Sarkar does not approve of these decisions, and observes in his work on Hindu law that notwithstanding these decisions such adoptions are made and recognized by Hindu society. As to successive adoptions, see sec. 468.

486. Dvyamushyayana or son of two fathers. (*1*) Where a person gives his son to another under an *agreement* that he should be considered to be the son of both the natural and adoptive fathers, the son so given in adoption is called "*dvyamushyayana.*"

(*2*) A *dvyamushyayana* inherits both in his natural and adoptitve families (*r*). In the case of a person adopted in the *nitya dvyamushyayana* form (which depends on the

(*l*) *Bashettiapa* v. *Shivlingappa* (1873) 10 Bom. H.C. 268; *Vaithilingam* v. *Natesa* (1914) 37 Mad. 529, 15 I.C. 299, ('14) A.M. 460, *Mareyya* v. *Ramalakshmi* (1921) 44 Mad. 260, 60 I.C. 141, ('21) A.M. 331.

(*m*) *Ramkishore* v. *Jainarayan* (1921) 48 I.A. 405, 49 Cal. 120, 64 I.C. 782, ('22) A.PC. 2 [Dhusars of the Punjab]; *Parshottam* v. *Venichand* (1921) 45 Bom. 754, 61 I.C. 492, ('21) A.B. 147 [Jains of Idar State], *Sukhbir* v. *Mangesar* (1927) 49 All. 302, 100 I.C. 778, ('27) A.A. 252 [Jagir situated in Gwalior]; *Kunwar Basant Singh* v. *Kunwar Brij Raj Saran Singh* (1935) 62 I.A. 180, 57 All. 494, 37 Bom. L.R. 805, 156 I.C. 864, ('35) A.PC. 132 [Jats of Ballabgarh].

(*n*) (1921) 44 Mad. 260, 60 I.C. 141, ('21) A.M. 331, *supra*.

(*o*) *Srimati Ooma* v. *Gokoolanund* (1878) 3 Cal 587, 5 I.A. 40; *Dharma* v. *Ramkrishna* (1886) 10 Bom 80.

(*p*) *Raj Coomar* v. *Bissessur* (1884) 10 Cal. 688, 696-97.

(*q*) *Akhoy Chunder* v. *Kalapahar* (1886) 12 Cal 406, 12 I.A. 198; *Surendrakeshav* v. *Doorgasundari* (1892) 19 Cal. 513, 19 I.A 108.

(*r*) *Srimati Ooma* v. *Gokoolanund* (1878) 3 Cal. 587, 598, 5 I.A. 40, 50 51; *Krishna* v. *Paramshri* (1901) 25 Bom. 537; *Behari Lal* v. *Shib Lal* (1904) 26 All. 472.

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stipulation and not on the ceremonies) his sons born after the adoption are entitled to participate in the inheritance of the adopter (*s*).

As to succession to a Dvyamushyayana son, see sec. 43 (7).

(3) Where a person gives his only son in adoption to his *brother*, the adoption must be *presumed* to be in the *dvyamushyayana* form, unless a stipulation is proved that the adoption was to be in the ordinary form. In Bombay, however, it has been held that there is no such presumption, and that a person alleging that an adoption was in the *dvyamushyayana* form must prove that there was an *agreement* to that effect, even if the person adopted was the only son of a brother (*t*).

The proposition in sub-sec. (3) is supported by certain observations in Mayne's Hindu Law, 9th ed., sec. 145, Sarkar's Hindu Law, 5th ed., p. 226, Tagore Lectures for 1888 on Adoption, p. 302, Strange's Hindu Law, vol. I, p. 86. In the Bombay Presidency, however, where the Courts are guided in questions of adoption by the Mitakshara and the Vyavahara Mayukha supplemented by the Dattaka Mimansa and the Dattaka Chandrika, it has been held that in every case of a *dvyamushyayana* adoption, there must be an agreement to that effect, and that such agreement must be proved as much in the case of the adoption of an only son of a brother as in any other case.

(4) Where a *dvyamushyayana* dies his property is taken jointly and equally by the adoptive mother and natural mother. If, after this, the adoptive mother adopts another son the natural mother is not divested of the property inherited (*u*).

487. Adoption of daughters by naikins (dancing girls.)—According to the Bombay and Calcutta decisions, the adoption of a daughter by a *naikin* or dancing girl is invalid notwithstanding a custom to the contrary, such custom being regarded as immoral (*v*). According to the Madras decisions, it is valid, provided the adoption is not made with the object of disposing of the girl for the purposes of prostitution (*w*). Even two girls may be adopted provided the practice is sanctioned by custom (*x*).

(*s*) *Ganpatrao Shripatrao* v. *Balkrishna Gururao* (1942) Bom. 340, 201 I.C. 633, ('42) A.B. 193, 44 Bom. L.R. 333.

(*t*) *Laxmipatirao* v. *Venkatesh* (1917) 41 Bom. 315, 38 I.C. 552, ('16) A.B. 68; *Huchrao* v. *Bhimarao* (1918) 42 Bom. 277, 44 I.C. 851, ('17) A.B. 10.

(*u*) *Kantawa* v. *Sangangowda* (1942) Bom. 303, 20 I.C. 633, ('42) A.B. 193, 44 Bom. L.R. 267.

(*v*) *Mathura* v. *Esu* (1880) 4 Bom. 545; *Hira* v. *Radha* (1913) 37 Bom. 116, 17 I.C. 834, *Hencower* v. *Hanscower* (1818) 2 Morl. Dig. 133; *Ghasiti* v. *Umrao Jan* (1893) 20 I.A. 193, 201-202. But see *Manjamma* v *Sheshagirirao* (1902) 26 Bom. 491, 495, where the adoption was by a prostitute, who was not a *naikin* attached to any temple.

(*w*) *Venku* v. *Mahalinga* (1888) 11 Mad. 393; *Muttukannu* v. *Paramasami* (1889) 12 Mad. 214. But see *Jiuddati* v. *Gunapati* (1912) 23 Mad. L.J. 493, 17 I.C. 422.

(*x*) *Gangamma* v. *Kuppammal* (1938) Mad. 789.

IV. ACT OF ADOPTION AND CEREMONIES INCIDENTAL TO IT.

488. Ceremonies relating to adoption.—(*1*) The ceremonies relating to an adoption are— **Ss. 488, 489**

(a) the physical act of giving and receiving, with intent to transfer the boy from one family into another [s. 489];

(b) the *datta homam*, that is, oblations of clarified butter to fire [s. 490]; and

(c) other minor ceremonies, such as *putresti jag* (sacrifice for male issue).

(*2*) The physical act of giving and receiving is *essential* to the validity of an adoption [s. 489].

As to *datta homam* it is not settled whether its performance is *essential* to the validity of an adoption in every case [s. 490].

As to the other minor ceremonies, their performance is *not necessary* to the validity of an adoption (*y*).

(*3*) No religious ceremonies, not even *datta homam*, are necessary in the case of Sudras (*z*). Nor are any religious ceremonies necessary amongst Jains (*a*) or in the Punjab (*b*).

489. Giving and receiving. (*1*) The physical act of giving and receiving is absolutely necessary to the validity of an adoption. This is so not only in the case of the twice born classes, but also in the case of Sudras (*c*). It is of the essence of adoption, and the law does not accept any substitute for it. Mere expression of consent, or the execution of a deed of adoption, though registered, but not accompanied by an *actual delivery* of the boy, does not operate as a valid adoption (*d*). To constitute giving and taking in adoption all that is necessary is that there should be some overt act to signify the delivery of the boy from one family to another (*e*).

(*y*) *Sheolotan* v. *Bhiqun* (1917) 2 Pat. L.J. 481, 41 I C. 375, ('17) A P. 633; *Retki* v. *Lak Pati* (1915) 20 C.W.N. 19, 27 I.C. 39, ('15) A.C. 214; *Raja Makund Deb* v. *Sri Jagannath* (1923) 2 Pat. 469, 482, 72 I.C. 230, ('23) A.P. 423; *Asita Mohon* v. *Nirode Mohan* (1916) 20 C. W N. 901, 35 I.C. 127, ('17) A.C. 292 [*sudras*].

(*z*) *Shoshinath* v. *Krishnasunderi* (1881) 6 Cal. 381, 388, 7 I.A. 250, 255; *Indromoni* v. *Beharilal* (1880) 5 Cal. 770, 7 I.A. 24; *Bal Gangadhar Tilak* v. *Shriniras* (1915) 42 I.A. 135, 151, 39 Bom. 441, 446, 29 I.C. 639, ('15) A.P.C. 7; (1916) 20 C.W.N. 901, 35 I.C. 127, ('17) A.C. 292, *supra* [*putresti jag* ceremony].

(*a*) *Lakshmi Chand* v. *Gatto Bai* (1886) 8 All. 319.

(*b*) Tupper's "Punjab Customary Law," vol iii, p 82.

(*c*) (1881) 6 Cal 381, 7 I.A 250; *supra*: *Ranganayakamma* v. *Alwar* (1890) 13 Mad. 214; *Bireshwar* v. *Ardha* (1892) 19 Cal 452, 19 I A 101. *Balak Ram* v. *Nanun Mal* (1930) 11 Lah. 503, 128 I.C 532, ('30) A. L. 579.

(*d*) *Shoshinath* v *Krishnasunderi* (1881) 6 Cal. 381, 388, 7 I.A. 250; *Sreenarain* v. *Sreemutty* (1873) 11 Beng. L. R. 171, I.A. Sup. Vol. 149.

(*e*) *Maroti* v. *Radhabai* (1944) Nag. 796.

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(2) The *power* (or *right*) to give a son in adoption cannot be delegated to any person (*f*); but the father or mother may authorize another person to perform the *physical* act of giving a son in adoption to a named person (*g*) and can delegate someone to accept the child in adoption on his or on her behalf (*h*) [s. 477].

490. Datta homam.—(*1*) *Datta homam* is not essential in the case of an adoption in the twice-born classes when the adopted son belongs to the same *gotra* as the adoptive father (*i*). There is a conflict of opinion whether in other cases *datta homam* is necessary. In Madras it was held in *Singamma* v. *Venkatacharlu* (*j*), a case decided in 1868, that neither *datta homam* nor any other religious ceremony was necessary even among Brahmans. This decision was followed in a later case where the parties were Kshatryas (*k*), and in another case in which the parties were Nambudri Brahmans (*l*). The ruling in *Singamma*'s case was, however, doubted by the same High Court in the under-mentioned cases (*m*). It is now held that *datta homam* is not necessary for the adoption of a daughter's son (*n*). In an Allahabad case, where the parties were Dakhani Brahmans, it was held that when the boy was the son of a daughter or of a brother, mere giving and taking was sufficient (*o*). In Bombay, it has been held that *Datta homam* is necessary (*p*). The Judicial Committee has not expressed any definite opinion on the question, but there is some indication of an inclination towards the view that *datta homam* is necessary (*q*).

(*2*) The *datta homam* may be performed at any time after the physical act of giving and receiving: it may be performed

(*f*) *Bhagwandas* v. *Rajmal* (1873) 10 Bom. H.C. 241; *Bashetiappa* v. *Shivlingappa* (1873) 10 Bom. H.C. 268.

(*g*) *Jamnabai* v. *Raychand* (1883) 7 Bom. 225; *Shamsing* v. *Santabai* (1901) 25 Bom. 551.

(*h*) *Behara Viyyamma* v. *Ayyagari Veera Venkata Satya Suryaprakash Rao* (1942) Mad. 608, ('42) A.M. 379.

(*i*) *Valubai* v. *Govind* (1900) 24 Bom. 218; *Bal Gangadhar Tilak* v. *Shrinivas Pandit* (1915) 42 I.A. 135, 39 Bom. 441, 29 I.C. 639, ('15) A.PC. 7; *Govindayyar* v. *Dorasami* (1888) 11 Mad. 5 [F.B.]; (1915) 20 C.W.N. 19, 27 I.C. 39, ('15) A.C. 214; *Vedavelli* v. *Mangamma* (1904) 27 Mad. 538, 539.

(*j*) (1868) 4 Mad. H.C. 165.

(*k*) *Chandra Mala* v. *Mukta Mala* (1883) 6 Mad. 20.

(*l*) *Shankaran* v. *Kesavan* (1892) 15 Mad. 7.

(*m*) *Venkata* v. *Subhadra* (1884) 7 Mad. 548; *Govindayyar* v. *Dorasami* (1888) 11 Mad. 5, 9-10 [F.B.]; *Ranganayakamma* v. *Alwar* (1890) 13 Mad. 214, 220 [Vaisyas]; *Subbarayar* v. *Subhammal* (1898) 21 Mad. 497.

(*n*) *Saminatha* v. *Vageesan* (1940) Mad. 98, 185 I.C. 37, ('39) A.M. 849.

(*o*) *Atmaram* v. *Madho Rao* (1884) 6 All. 276 [F.B.].

(*p*) *Govindprasad* v. *Rindabai* (1925) 49 Bom. 515, 87 I.C. 472, ('25) A.B. 289 [Kanoj Brahmans].

(*q*) *Shoshinath* v. *Krishnasunderi* (1881) 6 Cal. 381, 388, 7 I.A. 250, 255; *Bal Gangadhar Tilak* v. *Shrinivas Pandit* (1915) 42 I.A. 135, 149-150, 39 Bom. 441, 29 I.C. 639 ('15) A.PC. 7.

even after the death of the adoptive father (*r*), or of the natural father of the boy (*s*).

(*3*) The ceremony of *datta homam* may be performed by the parties who give and receive the boy in adoption, or the performance thereof may be delegated by them to others (*t*).

Datta homam.—Datta homam is the sacrifice of the burning of clarified butter, which is offered as a sacrifice by fire by way of religious propitiation or oblation (*u*).

Pollution.—It follows from sub-section (*3*), that pollution on account of the death or birth of a relation does not invalidate an adoption made during the period of such pollution. The *secular* formalities of giving and receiving may be performed by the adopter, though he may be in a state of pollution, while the *religious* part of the ceremony may be delegated to a priest or to a relation free from impurity. Even the physical act of giving in adoption may be delegated to another person. But the *right* or the *power* to give in adoption can be exercised only by the father or the mother, and cannot be delegated to any person.

491. Free consent.—(*1*) Every valid adoption implies the free consent to the adoption of the person giving and the person receiving in adoption, and also, it seems, of the person adopted, if he is a major at the date of adoption (*v*).

(*2*) Where the consent to an adoption is obtained by misrepresentation coercion, fraud, undue influence, or mistake, the consent is not free, and the adoption is voidable at the option of the party whose consent was so obtained (*w*). But it may be ratified by such party, provided the ratification does not prejudice the rights of other persons (*x*).

492. Consideration for adoption.—An adoption is not invalid merely because the person giving in adoption receives a consideration for the adoption from the person taking in adoption, though the promise to pay cannot be enforced in law (*y*).

(*r*) (1898) 21 Mad. 497, *supra*; *Seetharamamma* v. *Suryanarayana* (1926) 49 Mad. 969, 67 I.C. 615, ('26) A.M. 1184; *Chin Ana Muthu Ayyangar* v. *Thiruvengadammal* (1942) Mad. 682, 204 I.C. 393, 42 A.M. 595.

(*s*) *Venkata* v. *Subhadra* (1884) 7 Mad. 548, 550.

(*t*) *Lakshmibai* v. *Ramchandra* (1898) 22 Bom. 590; *Santappayya* v. *Rangappayya* (1895) 18 Mad. 397.

(*u*) *Bal Gangadhar Tilak* v. *Shriniras Pandit* (1915) 42 I.A. 135, 148, 39 Bom. 441, 463, 29 I.C. 639, ('15) A.PC. 7.

(*v*) Sircar's "Law of Adoption," 2nd Ed., pp. 279, 280; Strange's Hindu Law, vol. i, p. 88.

(*w*) *Bayabai* v. *Bala* (1870) 7 Bom. H. C. App. 1; *Ranganayakamma* v. *Alwa* (1890) 13 Mad. 214, 220-224; *Somasekhara* v. *Subhadramaji* (1882) 6 Bom. 524; *Sri Rajah Venkata* v. *Sri Rajah Rangayya* (1906) 29 Mad. 437; *Shri Sitaram* v. *Shri Harihar* (1911) 35 Bom. 169, 179-180, 8 I.C. 625. See also *Eshan Kishor* v. *Harischandra* (1874) 13 Beng. L.R. App. 42.

(*x*) *Sri Rajah Venkata* v. *Sri Rajah Rangayya* (1906) 29 Mad. 437; contra *Sattiraju* v. *Venkataswami* (1917) 40 Mad. 925, 930, 936-937, 40 I.C. 518, ('18) A.M. 1072.

(*y*) *Muragappa* v. *Nagappa* (1906) 29 Mad. 161; *Narayan* v. *Gopalrao* (1922) 46 Bom. 903, 67 I.C. 850, ('22) A.B. 382.

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493. Adoption cannot be cancelled: renunciation by adopted son of right of inheritance.—A valid adoption once made cannot be cancelled by the adoptive father(*z*) or other parties thereto, nor can the adopted son renounce his status as such and return to his family of birth. But there is nothing to prevent him from renouncing his right of inheritance in the adoptive family, in which case the inheritance would go to the next heir (*a*).

V.—RESULTS OF DATTAK ADOPTION.

494. Results of adoption.—(*1*) Adoption has the effect of transferring the adopted boy from his natural family into the adoptive family. It confers upon the adoptee the same rights and privileges in the family of the adopter as the legitimate son, except in a few cases. Those cases relate to marriage and adoption, [sub-sec. (*3*) below] and to the share on a partition between an adopted and an after-born son (*b*) [s. 497].

(*2*) But while the adopted son acquires the rights of a son in the adoptive family, he loses all the rights of a son in his natural family including the right of claiming any share in the estate of his natural father or natural relations or any share in the coparcenary property of his natural family. This follows from a text of Manu (Adhyaya, verse 142) which is as follows:—

"An adopted son shall never take the family (name) and the *estate of his natural father;* the funeral cake follows the family (name) and the estate; the funeral offerings of him who gives (his son in adoption) cease (as far as that son is concerned)."

Adoption does not under the Bengal School of Hindu Law (Dayabhaga law) divest any property which has vested in the adopted son by inheritance, gift, or under any power of self-acquisition prior to his adoption (*c*).

As regards cases governed by the Mitakshara law, it has been held by the Madras High Court, that an adoption does not divest any property which has *vested* in the adopted son *previous*

(*z*) *Bhoopathi Nath Chakrabarti* v. *Basenta Kumaree Debee* ('36) A C. 556.

(*a*) *Ruree Bhudr* v. *Roopshunkar* (1824) 2 Bor. Rep. 656; *Lakshmappa* v. *Ramava* (1875) 12 Bom. H. C. (A. C.) 364, 388; *Mahadu* v. *Bayaji* (1895) 19 Bom. 239; *Lunkurn* v. *Birji* (1930) 57 Cal. 1322, 130 I.C. 250, ('31) A.C. 219.

(*b*) *Pratapsingh* v. *Agarsingji* (1919) 46 I.A. 97, 43 Bom. 778, 50 I.C. 457, ('18) A.PC. 192; *Nagindas* v. *Bachoo* (1916) 43 I.A. 56, 67-68, 40 Bom. 270, 287-288, 32 I.C. 403, ('15) A.PC. 41.

(*c*) *Behari Lal* v. *Kailas Chunder* (1896) 1 C.W.N. 121; *Shyamcharan* v. *Sricharan* (1929) 56 Cal. 1135, 120 I C. 157, ('29) A. C. 337.

to the adoption; it has accordingly been held by that Court that where coparcenary property has already vested in a person as the sole surviving coparcener, and such person is subsequently adopted into another family, he does not, by adoption, lose his rights in that property (*d*). Following this decision it has been held by the Bombay High Court that a Hindu does not, on his adoption, lose the share which he has *already* obtained on partition from his natural father and brothers in his family of birth, the reason given being that such share cannot be said to be "the estate of his natural father" within the meaning of the above text (*e*). But it has been held by the same High Court that where property has vested in a person *as the heir of his father*, and such person is subsequently adopted into another family, he loses by adoption his rights in that property, that property being "the estate of his natural father" (*f*). **S. 494**

(*3*) Though adoption has the effect of removing the adopted son from his natural family into the adoptive family, it does not sever the tie of blood between him and the members of his natural family. He cannot, therefore, marry in his natural family within the prohibited degree, nor can he adopt from that family a boy whom he could not have adopted if he had remained in that family (*g*).

(*4*) The only cases in which an adopted son is not entitled to the full rights of a natural-born son are (1) where a son is born to the adoptive father after the adoption, and (2) where he has been adopted by a disqualified heir. The first of these cases is dealt with in sec. 497 below, and the second in sec. 102 above.

(*5*) Where a married person is given in adoption and such person has a son at the date of adoption, the son does not like his father lose the gotra and right of inheritance in the family of his birth, and does not acquire the gotra and right of inheritance in the family into which his father is adopted. The wife passes with her husband into the adoptive family because according to the Shastras husband and wife form one body (*h*). In such a case if the husband dies the wife cannot adopt her son,

(*d*) *Venkata Narsimha* v. *Rangayya* (1906) 29 Mad. 437.

(*e*) *Mahableshwar* v. *Subramanya* (1923) 47 Bom. 542, 72 I. C. 309, ('23) A. B. 297; *Manikbai* v. *Gokuldas* (1925) 49 Bom. 520, 87 I. C. 816, ('25) A. B. 363.

(*f*) *Dattatraya* v. *Govind* (1916) 40 Bom. 429, 34 I. C. 423, ('16) A.B. 210.

(*g*) *Mootia* v. *Uppon* (1858) Mad. S. D. 117.

(*h*) *Kalgavda* v. *Somappa* (1909) 33 Bom. 669, 3 I. C. 809.

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because she has lost the power to give and she cannot be both giver and taker (*i*). But it has been held that when a married Hindu is given in adoption and at the time of adoption his wife is pregnant, and a son is born to him, the son on his birth passes into the adoptive family and is entitled to inherit in that family, the reason given being that such a son is *born* into the adoptive family and should therefore be treated as a member of that family (*j*).

Illustrations.

(a) *A* has two sons *B* and *C*. *A* gives *C* in adoption to *X*. *C* is not entitled to inherit to *A* as his son.

(b) *A* and *B*, two brothers, and their respective sons, *C* and *D*, are members of a joint family. *A* gives his son *C* in adoption to *X*. *C* loses all his rights as a coparcener in his natural family. The coparcenary which consisted of four members before the adoption will be reduced after *C*'s adoption to a coparcenary of three members only.

(c) *A* and his son *C* are members of an undivided family. *A* dies, and on his death *C* becomes entitled to the whole of the coparcenary property *as sole surviving coparcener*. *C*'s mother then gives *C* in adoption to *X*. *C* does not, by adoption, lose his rights in that property.

495. Succession ex-parte paterna.—Subject to the provisions of sec. 497, an adopted son is entitled to inherit in the adoptive family as fully as if he were a natural-born son, both in the paternal and in the maternal line. He is entitled to inherit to his adoptive father, and to the father and grandfather and other more distant lineal ancestors of the adoptive father. He is also entitled to inherit to the adoptive father's brothers, the adoptive father's brother's sons and other collateral relations (*k*). And conversely, the adoptive father and his relations are entitled to inherit to the adopted boy as if he were a son born in the adoptive family.

A adopts *H* in conjunction with his wife *B*. After *B*'s death *A* marries *C* by whom he has a son *G* born to him. After *C*'s death, *A* marries *D*; there is no issue of this marriage. *A* then dies leaving *H*, *G* and *D*. Subsequently *D* dies leaving *stridhana*. Who is entitled to *D*'s *stridhana*? *H* and *G* as the *sapindas* of *A* are entitled in equal shares (*l*) [sec. 147].

496. Succession ex-parte materna.—(*1*) An adopted son is entitled to inherit to his adoptive mother and her relations, as, for instance, her father and brothers. And, conversely,

(*i*) *Sharat Chandra* v. *Shanta Bai* (1945) Nag. 544.

(*j*) *Adri* v. *Fakirappa* (1918) 42 Bom. 547, 46 I. C. 644, ('18) A. B. 168.

(*k*) *Padma Kumari* v. *Court of Wards* (1882) 8 Cal. 302, 8 I. A. 229; *Chandreshwar* v. *Bisheshwar* (1926) 5 Pat. 777, 101 I. C. 209, ('27) A. P. 61 [Mithila].

(*l*) *Gangadhar* v. *Hira Lal* (1916) 43 Cal. 944, 34 I. C. 10, ('17) A.C. 575.

the adoptive mother and her relations are entitled to inherit to him (*m*).

(*2*) Even if the wife of the adopter was dead at the date of adoption, the adopted son becomes her son by virtue of the adoption, and is entitled as such to inherit to the relations in her father's family (*n*). An adoption by a Hindu widower being valid, the adoption will take effect as if the son had been adopted in the life time of the deceased wife of the adoptive father. The adopted son will divest all estates which had vested before the adoption on the death of the adoptive mother by reversion to her parent's family being Stridhanam property which she had inherited. An alleged custom that such a reverter would exclude a son adopted after the wife's death was not established (*o*).

(*3*) Where a Hindu, having two or more wives, makes an adoption in conjunction with one of them specially selected for the purpose, the wife so selected ranks as the adoptive mother, and the other wives as mere step-mothers. The adopted son inherits only to the adoptive mother and to her relations, and she alone and her relations can inherit to him. The same principle applies when an adoption is made by one of several widows in pursuance of an authority left to her alone (*p*). In other cases, it is not settled whether the adopted son inherits to *all* the wives of the adoptive father and their relations (*q*).

Illustration.

A, who has two wives *B* and *C*, adopts a son *D* in conjunction *with his wife B*. *A* dies, and on his death *D* succeeds to his estate. *D* then dies unmarried. *B* is entitled to inherit to *D* as his mother to the entire exclusion of *C*: *Annapurni* v. *Forbes* (1909) 23 Mad. 1, 26 I. A. 246.

497. Son born after adoption.- (*1*) The statement of law in the above sections that an adopted son is entitled to inherit just as if he were a natural-born son, is subject to the exception mentioned below :—

Where a son is born after adoption to the adoptive father, (a) the adopted son does not, on a partition between him and

(*m*) *Kali Komul* v. *Uma Shunker* (1884) 10 Cal. 232, 10 I.A. 138; *Radha Prasad* v. *Ranee Mani* (1906) 33 Cal. 947; *Dattatraya* v. *Gangabai* (1922) 46 Bom. 541, 77 I. C. 17, ('22) A. B. 321; *Sowntharapandian Ayyangar* v. *Periaveru Thevan* (1933) 56 Mad. 759, 145 I.C. 534, ('33) A.M. 500.

(*n*) *Sundaramma* v. *Venkatasubba* (1926) 49 Mad. 941, 97 I. C. 115, ('26) A. M 1203.

(*o*) *Subramaniam* v. *Muthiah Chettiar* (1945) Mad. 638.

(*p*) *Annapurani* v. *Forbes* (1899) 23 Mad. 1, 26 I.A. 246.

(*q*) Mayne's Hindu Law, s. 167.

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the after-born natural son, share *equally* with him as he would have done if he were a natural son, but he takes—

(1) in Bengal, one-third of the adoptive father's estate;

(2) in Benares, one-fourth of the estate; and

(3) in the Bombay and Madras Presidencies, one-fifth of the estate (*r*); and

(b) if the estate is impartible, the aurasa son alone succeeds to it (*s*).

Except as aforesaid an adopted son is entitled to the same share as a legitimate son [ill. (b)].

(*2*) Among Sudras in Madras and Bengal, an adopted son shares equally with the after-born natural son (*t*); in Bombay, he takes one-fifth of the estate (*u*).

(*3*) The same rules apply on a partition in the life-time of the father. Thus in Madras the father and the after-born natural son will each take four shares and the adopted son one share in the whole estate.

Illustrations.

(a) *A*, a childless Hindu, adopts a son *B*. A son *C* is then born to *A*. *A* dies leaving property worth Rs. 3,000. In Bengal, *B* would take Rs. 1,000 and *C* Rs. 2,000 In Benares *B* would take Rs. 750, and *C* Rs. 2,250. In Bombay and Madras, *B* would take Rs. 600, and *C* Rs. 2,400.

(b) *A* and *B* are two brothers. *A* has a son *C*. *B*, who has no son, adopts *D*. The parties are all members of a joint family governed by the Mitakshara law. After the death of *A* and *B*, *D* sues *C* for a partition. *D* is entitled to a share *equal* to that taken by *C*, that is, *D*'s adoptive father's brother's son: *Nagindas* v. *Bachoo* (1915) 43 I. A. 56, 40 Bom. 270, 32 I. C. 403, ('15) A.PC. 41, overruling the Calcutta and Bombay decisions noted below (*v*), where it was held that *D* was entitled not to a share equal to that taken by *C*, but to the smaller shares as if *C* was an after-born son.

498. Rights of adopted son in separate property.—Power of adoptive father to dispose of separate property. (*1*) A Hindu adopting a son does not thereby deprive himself of the power he has to dispose of his separate property, by gift or will. There is no implied contract on the part of the adoptive

(*r*) *Giriapa* v. *Ningapa* (1893) 17 Bom. 100; *Ayyavu* v. *Niladatchi* (1862) 1 Mad. H. C. 45.

hebgouda v. *Shiddangouda* (1939) Bom. 314.

rrazu v. *Subbarayadu* (1921) 48 I.A. 280, 44 Mad. 656, 61 I.C. 690, ('22) A.PC. 71; *Asita* v. *Nirode* (1916) 20 C. W. N. 901, 35 I. C. 127, ('17) A. C. 202.

(*u*) *Tukaram* v. *Ramchandra* (1925) 49 Bom. 672, 89 I. C. 984, ('25) A. B. 425.

(*v*) *Raghubanund Doss* v. *Sadhu Churn* (1879) 4 Cal. 425; *Bachoo* v. *Nagindas* (1914) 16 Bom. L.R. 263, 23 I.C. 912, ('14) A.B. 38. See also *Raja* v. *Subbaraya* (1888) 7 Mad. 523.

father, in consideration of the gift of his son by the natural father, that he will not dispose of his property by gift or will (*w*). **Ss. 498, 499**

(*2*) An adopted son does not stand in a better position, with regard to the separate property of his adoptive father, than a natural born son; and there is nothing in the Hindu law to prevent a father from disposing of by will his separate property, and so defeating the rights by inheritance of his son (*x*). But where the boy is given in adoption under an express agreement that the adoptive father shall not dispose of his property to the prejudice of the adopted son, the adoptive father cannot dispose of the property to the boy's prejudice (*y*).

(*3*) An alienation by way of gift by the adoptive father of his separate property prior to the adoption is binding on the adopted son (*z*).

The will of a Hindu disposing of his separate property is not revoked by the subsequent adoption of a son by him (*a*). Where a Hindu disposes of his separate property by will, and an adoption is made to him by his widow after his death, the disposition by will is not affected by the adoption, for the will speaks as at the death of the testator, and the property is carried away before the adoption takes place (*b*). The adopted son takes subject to the provisions of the will (*c*).

This section applies also to property held by a father in Bengal, he having an absolute power to dispose of his property, whether ancestral or self-acquired [s. 274].

499. Rights of adopted son in coparcenary property. (*1*) An alienation of coparcenary property, valid when it was made, is binding upon a son adopted after the date of alienation [s. 270 (*3*)] (*d*).

In provinces referred to in sec. 268, an alienation by a coparcener of his share in the coparcenary property made without legal necessity or in excess of his interest in the coparcenary property, is binding upon a coparcener adopted after the date of the alienation (*e*).

(*w*) *Sri Raja Venkata Surya* v. *Court of Wards* (1939) 22 Mad. 383, 26 I. A. 83, *Surrendranath* v. *Kala Chand* (1907) 12 C.W.N. 668; *Purshotam* v. *Vasudev* (1871) 8 Bom. H. C. O.C. 196.

(*x*) *Purshotam* v. *Vasudeo* (1871) 8 Bom. H. C. O. C. 1968 · *Subba Reddi* v. *Doraisami* (1907) 30 Mad. 369.

(*y*) *Surendrakeshav* v. *Doorgasundari* (1892) 19 Cal. 513, 586, 19 I.A. 108, 132.

(*z*) See *Kalyanasundaram* v. *Karuppa* (1927) 54 I.A. 89, 50 Mad. 193, 100 I.C. 105, ('27) A.PC. 42 [gift before adoption].

(*a*) See *Vinayak* v. *Govindrav* (1869) 6 Bom. H. C. 224, 229.

(*b*) *Krishnamurthi* v. *Krishnamurthi* (1927) 54 I A. 248, 262, 50 Mad. 508, 518, 101 I.C. 779, ('27) A.PC. 139.

(*c*) *Venkatanarasimha* v *Subba Rao* (1923) 46 Mad. 300, 73 I.C. 991, ('23) A.M. 376.

(*d*) *Veeranna* v. *Sayamma* (1929) 52 Mad. 398, 118 I.C. 821, ('29) A M. 296; *Brij Raj Saran* v. *Alliance Bank of Simla* (1936) 17 Lah. 686 ('36) A. L. 946.

(*e*) *Basavantappa* v. *Mallappa* (1939) Bom. 245, ('39) A. B. 178.

Ss. 499, 500

(2) Where an adoption is made by a member of a joint family governed by the Mitakshara law, the adopted son becomes a member of the coparcenary from the moment of his adoption, and the adoptive father has no power either by deed or will to interfere with the rights of survivorship of the adopted son in the coparcenary property. The same principle applies where an adoption is made by a sole surviving coparcener subject, however, to any agreement binding the adopted son such as is mentioned in sec. 368 above (*f*). See also sec. 500.

This section applies to *ancestral* property in cases governed by the Mitakshara law. Just as the father cannot by deed or will defeat the rights of survivorship of a natural born son, so he cannot defeat the rights of survivorship of an adopted son.

(3) Where the last male owner makes a valid bequest of his property and also gives his widow power to adopt, the adopted son is bound by the disposition in the will. If, under the will, the widow is entitled to a life estate in the property and the adopted son to a vested remainder and to a certain sum for his maintenance, it is competent to him to convey his interest to the widow and thus enlarge the life estate into an absolute estate in consideration of the increase of the amount of maintenance (*g*).

(4) Where a Hindu (*A*) adopted a son and by a registered deed of adoption provided that his wife should enjoy the property in her own right for her life, it was held that the deed did not affect the rights of a son adopted by the widow of *A*'s pre-deceased undivided brother, as it could not be regarded as a family arrangement as far as the second adopted son is concerned and he was entitled to his share (*h*).

500. Agreements curtailing rights of adopted son.—(*1*) Where the adopted son was a major at the time of the adoption, he may by an agreement with the adoptive father or the adopting widow made before the adoption, consent to a limitation of his rights in the property of his adoptive father (*i*).

(*f*) *Villa Butten* v. *Yamenamma* (1874) 8 Mad. H.C. 6. *Venkatanarayana* v. *Subbammal* (1915) 43 I.A. 20, 39 Mad. 107, 32 I.C. 383, ('15) A.PC. 37. *Parmanand* v. *Shiv Charan Das* (1921) 2 Lah. 69, 59 I.C. 256, ('21) A. L. 147.

(*g*) *Basant Kumar Basu* v. *Ram Shankar Ray* (1932) 59 Cal. 859, 138 I.C. 882, ('32) A.C. 600.

(*h*) *Laxmibai* v. *Kesharrao* (1941) Bom. 306, 197 I.C. 192, 43 Bom. L.R. 214, ('41) A. B. 193.

(*i*) *Kashibai* v. *Tatya* (1916) 40 Bom. 668, 36 I.C. 546, ('16) A.B. 312; *Pandurang* v. *Narmadabai Ram Krishna* (1932) 56 Bom. 305, 140 I.C. 200, ('32) A.B. 571.

(2) Where the adopted son is a minor, the question arises whether it is competent to his natural father to enter into an agreement with the adoptive father or the adopting widow limiting his son's rights in the property of the adoptive father. This question came up before the Judicial Committee in *Krishnamurthi* v. *Krishnamurthi* (*j*) where it was held that having regard to a consensus of judicial decisions [excepting that in *Jagannadha* v. *Papamma* (1893) 16 Mad. 400], an arrangement made on the adoption of a minor whereby the widow of the adoptive father is to *enjoy his property during her lifetime, or for a less period*, that arrangement being consented to by the natural father before the adoption, is to be regarded as valid by custom (*k*). "As soon, however, as the arrangements go beyond that, *i.e.*, either give the widow property absolutely or give the property to strangers, they think no custom as to this has been proved to exist and that such arrangements are against the radical view of Hindu law." An agreement or consent by the natural father is not effectual in law or by custom to validate *any other disposition* taking effect after the adoption and curtailing the rights of the adopted son in property in which he acquires a present and an immediate interest by virtue of the adoption. **S. 500**

The High Court of Madras (*l*), however, has held that an agreement between the adopting mother and the natural father whereby a *portion* of her husband's estate is settled upon her for her absolute use and enjoyment with powers of alienation is valid and binding on the adopted son, if the agreement is fair, reasonable and beneficial to him, and that the principle of the Full Bench ruling of that Court in *Visalakshi* v. *Siva Ramier* (*m*), as regards agreements between the *adopting widow* and the natural father, namely, that such agreements are valid if they are fair and reasonable, has not been affected by the Privy Council ruling referred to above.

In the Madras case referred to above, Ramesam, J., said that the word "property" in the sentence from the judgment of the Privy Council set out above referred to the whole property, and not to a part thereof.

(*j*) (1927) 54 I.A. 248, 50 Mad. 508, 101 I.C. 779, ('27) A.PC. 139. See also *Bhaiya Rabidat Singh* v. *Indar Kunwar* (1888) 16 I.A. 53, 59, 16 Cal. 556, 564; *Chitko* v. *Janaki* (1874) 11 Bom. H.C. 199, *Ravji* v. *Lakshmibai* (1887) 11 Bom. 381, *Lakshmi* v. *Subramanya* (1889) 12 Mad. 490; *Visalakshi* v. *Siva Ramier* (1904) 27 Mad. 577; *Balwant Singh* v. *Joti Prasad* (1918) 40 All. 602, 47 I.C. 599, ('18) A.A. 115; *Durgi* v. *Kanhaiya Lal* (1927) 49 All. 579, 101 I.C. 678, ('27) A.A. 387.

(*k*) *Hemendra Nath* v. *Jnanendra* (1936) 63 Cal. 155, 159 I.C. 1101, ('35) A.C. 702; *Banarsi Das* v. *Sumat Prasad* (1936) 58 All. 1019, 164 I.C. 1047, ('36) A.A. 641.

(*l*) *Raju* v. *Nagammal* (1929) 52 Mad. 128, 113 I.C. 449, ('28) A.M. 1289.

(*m*) (1904) 27 Mad. 577 [F.B.].

S. 500 (3) Though an agreement going beyond that sanctioned by custom does not bind the minor, it is not void, and it may be ratified by the adopted son on attaining majority, in which case he will be held bound by it (n).

Illustrations.

(a) *A*, the sole surviving member of a joint Hindu family, makes a will whereby he bequeaths part of the joint *family property* to a son whom he is about to adopt, part to his widow for life, part to kindred and part to charity. Before the adoption takes place the natural father of the adopted boy executes a deed by which he consents to the provisions of the will. Immediately thereafter the testator adopts the son with all due ceremony. The will is not binding upon the adopted son: *Krishnamurthi* v. *Krishnamurthi* (1927) 54 I.A. 248, 50 Mad. 508, 101 I.C. 779, ('27) A.PC. 139.

(b) A grant of an annual sum for the purpose of lighting lamps in a temple made by the adoptive father at the time of adoption out of *joint family property* does not bind the adopted son, though it may be made with the consent of the natural father, unless such grant is recognised by custom as a grant that can be properly made at the time of adoption: *Balkrishna* v. *Shri Uttar* (1919) 43 Bom. 542, 50 I.C. 912, ('19) A.B. 101.

(c) The following agreements are also invalid:—

(1) an agreement providing that the widow should have all the rights to which she would have been entitled in the absence of a son: *Purshottam* v. *Rakhmabai* (1914) 16 Bom. L.R. 57, 23 I.C. 599, ('14) A. B. 28.

(2) an agreement enabling the widow to make a gift of a part of her husband's property to her brother: *Venkappa* v. *Fakirgowda* (1906) 8 Bom. L.R. 346.

(3) an agreement enabling the widow to settle immoveable property forming part of her husband's estate in favour of her daughter: *Vyasacharya* v. *Venkubai* (1913) 37 Bom. 251, 17 I.C. 741.

In *Krishnamurthi* v. *Krishnamurthi* referred to above, it was held by their Lordships of the Privy Council that the consent of the natural father as *such* cannot affect the rights of the boy, for those rights do not arise until after his rights as a natural father become non-existent. It was also held that the natural father cannot bind his son by his consent given *as guardian and manager* of the estate of his son, for "the natural father is not managing the estate of his child when the estate referred to is the estate which he will only get after adoption by another person." As to the doctrine of approbate and reprobate resorted to in some cases in support of the validity of the agreements now under consideration their Lordships said: "Next, can the case be solved by the doctrine of approbate and reprobate? Their Lordships think clearly not, for the doctrine of approbate and reprobate assumes election, and the adopted son has no election. He cannot undo the adoption and be as he was." Their Lordships eventually held that the only ground on which even an agreement limiting the enjoyment by a widow of her husband's property during her lifetime could be upheld was that such an agreement was sanctioned by custom established by the consensus of judicial decisions.

VI.—DIVESTING OF ESTATE ON ADOPTION BY WIDOW.

Preliminary note.—The question of divesting of estate by adoption can only arise when the adoption is made by a widow after her husband's death. It can never arise when an adoption is made by a man in his lifetime; for, in that case, his estate vests,

(n) *Ramasami* v. *Vencatramaiyan* (1879) 2 Mad. 91, 101, 6 I.A. 196, 208; *Kali Das* v. *Bijai Shanker* (1891) 13 All. 391, 393; *Subramania Chettiar* v. *Velayudan. Chettiar* (1932) 55 Mad. 408, 135 I.C. 311, ('31) A.M. 808.

on his death, in the adopted son as his nearest heir, and it cannot vest in any other person. But when an adoption is made by a widow after her husband's death, it may be that his estate is, at the date of adoption, vested in the widow as his heir or it may be that it has passed to others and vested in them as in illustration (e) to section 502 below. The question then arises whether the adopted son is entitled to the estate of his adoptive father in *whosesoever's hands* it may be at the date of adoption. The answer is in the negative; he is entitled to it in *certain cases only*, these being the cases set forth in section 502 below.

Again, if the adoptive father was a member of a joint family governed by the Mitakshara law at the time of his death, it may be that his interest which passed to his coparceners by survivorship is still vested in them at the date of adoption by the widow, or it may be that it has passed from the sole surviving coparcener on his death to his heirs. In the former case the adoption vests in the adopted son the coparcenary interest of his adoptive father. As to the latter case there is a conflict of opinion. This subject is dealt with in section 506 below.

The subject-matter of sec. 502 is closely connected with that of sec. 471, namely, "Termination of widow's power to adopt." The two sections relate to the same subject in different forms."

501. Vesting and divesting of estate.—A valid adoption by a widow, if her husband was divided at the time of his death, may divest an estate of inheritance. It may, if her husband was a member of a joint family governed by the Mitakshara law, divest rights acquired by survivorship. The question what estate of *inheritance* is divested by adoption, is dealt with in sections 502 and 503 below. The question in what cases adoption can divest rights acquired by *survivorship*, is dealt with in section 506 below. [But now see notes to secs. 471 and 472.]

502. Divesting of estate of inheritance.—Where a widow adopts, one of the objects of adoption is to perpetuate the adoptive father's name by securing an heir (s. 447). It now remains to be seen how far this object is attained.

In the cases mentioned in s. 471 (*1*) the adoption is valid. The widow divests herself and the adopted son gets the property. [*Vide* ills. (a) to (e) of s. 471.]

In the cases mentioned in s. 471 (*2*) (a) the adoption is invalid. No question of divesting the estate arises. (*Vide* ills. (f) and (g) of s. 471.)

In the case mentioned in s. 471 (*2*) (b) the adoption is valid and divests the property.

In the case mentioned in s. 471 (*2*) (c) the same result ought to follow.

Ss. 502, 503

But a valid adoption does not divest the estate of a person other than the adoptive father which had passed to his heir prior to his adoption, even if the adopted son might have succeeded to it if the adoption had been made earlier, (*i.e.*) prior to the opening of the succession.

Illustrations.

(a) *A* dies leaving three widows, and *SW*, the widow of a predeceased son. On *A*'s death his estate vests in his widows. *SW* then adopts a son to her husband. The adoption does not divest the estate vested in *A*'s widows: *Dharnidhar* v. *Chinto* (1896) 20 Bom. 250.

(b) *A* dies leaving a widow *W* and a brother *B*. On *A*'s death his estate vests in *W* as his heir. *B* then dies leaving a widow *BW* with authority to her to adopt a son. On *B*'s death, his estate vests in *BW* as his heir. While *W* is still alive. *BW* adopts a son *X* to her husband *B*. The adoption is valid, but it will only divest the estate of *B* vested in *BW* so as to vest it in *X*; it cannot divest the estate of *A* vested in *W*. On *W*'s death, however, the estate of *A* will pass to *X* as *A*'s nephew. See the next illustration.

(c) In the case put in ill. (b) *BW* adopts *X* *after* the death of *W*, and *after* the estate of *A* has passed on *W*'s death to *A*'s *sapindas*. The adoption will not divest the estate of *A* vested in his *sapindas*: *Kally Prosonno Ghose* v. *Gocool Chunder* (1877) 2 Cal. 295.

(d) *A* dies leaving a widow *W*, and two brothers *B* and *B1*. On *A*'s death his estate vests in *W* as his heir. *B* dies leaving a son *BS*. Then *B1* dies leaving a widow *B1W* with authority to her to adopt a son to him. While *W* is alive, *B1W* adopts a son *X* to her husband *B1*. The adoption is valid; it will divest the estate of *B1* vested in *B1W* and vest it in *X*, but it will not divert the estate of *A* vested in *W*. On *W*'s death, however, the heirs to the estate of *A* will be his brothers' sons *BS* and *X*; and they will inherit the property in equal shares. But if *B1 W* adopts *X* *after* *W*'s death and *after* the estate of *A* has vested in *BS* as his brother's son, *X* cannot, on his adoption, demand from *BS* half the property of *A*, not even if the adoption was delayed beyond *W*'s lifetime by the fraud of *BS*: *Bhubaneswari Debi* v. *Nilcomul* (1886) 12 Cal. 18, 12 I.A. 137. This case was distinguished in *Anantha Bikkappa* v. *Shankar* (1944) 70 I.A. 232, and applied and followed by the Patna High Court (*o*).

503. Further case of divesting of estate in Bombay.—It is clear from s. 471 that the widow's power to adopt is at an end in some cases. If she does adopt in such a case, the adoption is invalid, and it does not divest the estate vested in another. It has, however, been held by the High Court of Bombay (*p*), that if the widow in such cases adopts with the consent of the person in whom the estate was vested, the adoption is not only valid, but it divests the estate vested in the consenting party. The High Court of Bombay stands alone in holding this view. The High Court of Madras has expressly dissented from it (*q*).

(*o*) *Chandra Choor Deo* v. *Vibhuti Bhushan Deva* (1944) 23 Pat. 763.

(*p*) *Babu* v. *Ratnoji* (1897) 21 Bom. 319; *Payapa* v. *Appanna* (1899) 23 Bom. 327; *Bhimappa* v. *Basava* (1905) 29 Bom. 400; *Siddappa* v. *Ningangqwda* (1914) 38 Bom. 724, 27 I.C. 51, ('14) A.B. 107.

(*q*) *Annammah* v. *Mabbu Bali Reddi* (1875) 8 Mad. H.C. 108.

Illustrations.

Ss. 503-506

(a) *A* and *B* are divided brothers. *A* has a son *S* who dies in his lifetime leaving a widow *SW*. *A* dies, and on his death his estate vests in *B* as his nearest heir. Here the estate being vested in *B*, *SW* cannot adopt to her husband *S*. *SW* then adopts a son *with B's consent*. The adoption is valid, and it will divest the estate [of *A*] vested in *B*, and vest it in the adopted son: *Babu* v. *Ratnoji* (1897) 21 Bom. 319.

(b) *A* dies leaving a widow and a daughter-in-law *SW*. On *A*'s death his estate vests in his widow. *SW* then adopts a son to her husband with the consent of *A*'s widow. The adoption is validated by the consent, and it will divest the estate [of *A*] vested in *A*'s widow, and vest it in the adopted son: *Payappa* v. *Appanna* (1889) 23 Bom. 327. As *A*'s estate vests in the adopted son, the power of *A*'s widow to adopt a son to *A* comes to an end: *Vaman* v. *Venkaji* (1921) 45 Bom. 829, 61 I.C. 460, ('21) A.B. 55.

It will be remembered that in the Madras and Bombay Presidencies a widow may adopt even without any authority from her husband. In Madras, she must in such a case obtain the consent of her husband's *sapindas*, even if the estate of her husband is *vested in her* [s. 462]. In Bombay, she does not require the consent of any person if her husband's estate is vested in her [s. 463]. But if her husband's estate is vested in a third party, she may adopt with the consent of that party, and an adoption made with such consent is valid.

504. Stridhana not divested.—Adoption by a widow does not divest her *stridhana* (*r*).

505. Maintenance of widow on divesting of estate.—Subject to any agreement that may have been made by the widow prior to adoption [s. 500], a widow whose estate is divested by adoption is entitled only to maintenance out of her husband's property (*s*).

In fact, her rights are reduced to what they would have been if the husband had left a son.

506. Adoption by widow in a joint family.—When a member of a joint family governed by the Mitakshara law dies and the widow validly adopts a son to him [ss. 462 (*2*), 463 (*3*), 472 and 473], a coparcenary interest in the joint property is immediately created by the adoption co-extensive with that which the deceased coparcener had, and it vests at once in the adopted son.

Illustrations.

(a) In the ills. (a) and (b) to sec. 472 the adopted son becomes a member of the coparcenary and is entitled to the share of his adoptive father.

(b) In the ills. (d), (e) and (f) to sec. 472 the adopted son being in the senior line becomes entitled to zemindary, raj, or talukdary respectively by the rule of lineal primogeniture [s. 590] and thus divests the junior member of the family in whom the property has been vested in the interval between the death of the adoptive father and the adoption.

(c) In ill. (g) to sec. 472 the adopted son *P* is entitled to *jivai* estate and divests the Thakore in whom it is vested subject to being divested by adoption.

(*r*) West and Buhler, 4th ed., 1033.

(*s*) *Jamnabai* v. *Raychand* (1883) 7 Bom. 225; *Dalel* v. *Ambika* (1903) 25 All. 266.

Ss. 506-509

The fact that only one member of the joint family survives at the time of adoption as in ills. (a) and (b), is no bar to an adoption in the joint family. The family continues to be joint so long as any widow remains in it with a power to adopt. *A* & *B* two brothers, were members of joint family. *A* died leaving a widow. *B* afterwards adopted *D* and relinquished the property to *D*. *A*'s widow now adopted. It was held that the adoption was valid and that the adopted son could claim a repartition of the property in the hands of *S*, but was not entitled to the Watan that belonged to the family (*t*).

The joint family does not come to an end on the death of the last male coparcener. It continues to exist so long as a widow of a coparcener remains. If there is one widow she can adopt, and the adopted son will divest the property, wherever it is vested at the time (*u*).

If there is more than one widow both can adopt, both adoptions are valid (*v*) except when the two widows are in the relation of mother-in-law and daughter-in-law. In the last case only the first adoption is valid.

VII.—ALIENATIONS MADE PRIOR TO ADOPTION.

507. Adopted son's rights date from adoption.—The rights of an adopted son arise for the first time on his adoption. Even where the adoption is made by a widow, his rights do not relate back (as was supposed at one time) to the date of the death of the adoptive father (*w*). But where an adoption is made by a widow, the adopted son has a right, in certain cases, to impeach alienations by her, though made prior to his adoption [s. 509].

In the case in which the above proposition was laid down, it was argued before the Judicial Committee, that a widow who had received an authority from her husband to adopt should be considered as pregnant at the date of his death, and that the son adopted by her should be regarded as a posthumous son; but the Judicial Committee refused to act upon any such fanciful analogy, and held that although a son, when adopted, acquires at once the full rights of a natural-born son, his rights cannot relate back to any earlier period.

508. Alienations by adoptive father prior to adoption.—An adopted son is bound by alienations made by his adoptive father prior to the adoption to the same extent as a natural-born son would be [s. 498 (*3*), s. 499 (*1*)].

509. Alienations by widow before adoption.—(*1*) The rights of an adopted son spring into existence *at the moment of adoption*, and displace the rights of the widow and of all persons claiming under a title derived from her. The result of the adoption being to divest the widow's estate, the widow cannot after adoption alienate any portion of her husband's estate for any purpose whatever.

(*t*) *Ramachandra Balaji* v. *Shankar Apparao* (1945) Bom. 353.

(*u*) *Umabai* v. *Nani* (1936) 60 Bom. 102, 38 Bom. L. R. 100, 162 I.C. 133, ('36) A. B. 135.

(*v*) *Mst Draupadi* v. *Vikram* (1939) Nag. 88.

(*w*) *Bamundoss* v. *Tarinee* (1858) 7 M.I.A. 169.

(2) As regards alienations made by the widow *before* the adoption, if they are made for a legal necessity [ss. 181A, 181B], or with the consent of the next reversioners [s. 183], the adopted son is as much bound by them as the reversioners would be (*x*). If the widow and the next reversioner with full rights such as a male reversioner or a daughter in Bombay (*y*) join in the alienation of the whole estate, the transaction may be regarded as a surrender, and is, therefore, valid though there is no legal necessity. But if the alienation was made without legal necessity or without the consent of the reversioners, the alienation is valid to the extent only of the widow's interest in the estate *up to the date of adoption*. After adoption the alienee has no power to retain the property as against the adopted son unless the claim of the adopted son has become barred by limitation. The rights of the adopted son do not await the determination of the widow's estate by her death as in the case of reversioners (*z*).

Alienation with consent of reversioners.- If the alienation was made by the widow with the consent of the next reversioners, but under circumstances which do not raise a presumption of legal necessity, the Court will upon proof of those circumstances set aside the alienation as against the adopted son (*a*) [s. 183].

Limitation.- The period of limitation for a suit by an adopted son against an alienee from the widow is 12 years from the date when the possession of the alienee becomes adverse to him; see Indian Limitation Act, 1908, art. 144. Where a sale is not for legal necessity, the adopted son is entitled to treat it *as a nullity*, and he may sue for possession without suing to have the sale set aside (*b*); hence art. 91 of the Indian Limitation Act, 1908, will not come in his way (*b*). See notes to sec. 209.

A son adopted by a widow after the death of the first adopted son divests the adoptive mother of the estate inherited by her from her first adopted son and is unaffected by alienations made by her without necessity (*c*).

VIII.—EFFECTS OF INVALID ADOPTION.

510. Effects of invalid adoption. As a general rule it may be laid down that where there has been an adoption in form, but such adoption is invalid, the adopted son does not acquire

(*x*) *Lakshmana Rau* v. *Lakshmi* (1882) 4 Mad. 160; *Lakshman Bhau* v. *Radhabai* (1887) 11 Bom. 609; *Antaji* v. *Dattaji* (1895) 19 Bom. 36; *Moro Narayan* v. *Balaji* (1895) 19 Bom. 809.

(*y*) *Yeshwanta* v. *Anta* (1934) 58 Bom. 521, 154 I. C. 252, ('34) A.B. 251.

(*z*) (1887) 11 Bom. 609, *supra*; (1895) 19 Bom. 809, *supra*; *Ramkrishna* v. *Triparabai* (1909) 33 Bom. 88, 1 I. C. 647; *Vaidyanath* v. *Savithri* (1918) 41 Mad. 75, 42 I. C. 245, ('18) A.M. 469 [F.B.] overruling *Sreeramulu* v. *Kristamma* (1903) 26 Mad. 143; *Pilu* v. *Babaji* (1910) 34 Bom. 165, 4 I. C. 584 [invalid surrender—subsequent adoption]; *Sakharam* v. *Thama* (1927) 51 Bom. 1019, 107 I.C. 265, ('28) A. B. 26 [invalid surrender—subsequent adoption].

(*a*) *Ramkrishna* v. *Triparabai* (1911) 13 Bom. L. R. 940, 12 I. C. 529.

(*b*) *Hanamgowda* v. *Irgowda* (1924) 48 Bom. 654, 84 I. C. 374, ('25) A. B. 9.

(*c*) *Hanmant* v. *Krishna* (1925) 49 Bom. 604, 89 I. C. 62, ('25) A. B. 402; *Pattu Achi* v. *Rajagopala Pillai* (1944) Mad. 970, ('41) A.M. 699.

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any rights in the adoptive family, nor does he forfeit his rights in his natural family (*d*).

511. Gift to a person whose adoption is invalid.—Where a gift or bequest is made to a person who is described as an adopted son, but such person was not adopted at all, or if he was adopted, his adoption is held to be invalid, the validity of the gift or bequest depends on the intention of the donor or testator to be gathered from the language of the deed of gift or will and from the surrounding circumstances (*e*). If the intention is to benefit the donee as *persona designata* [that is a designated person], the addition of his supposed relationship is merely a matter of description, and the gift prevails though the description is incorrect (*f*). But if the assumed fact of adoption is "the reason and motive of the gift and indeed a condition of it," then the gift cannot take effect if the adoption is pronounced invalid (*g*).

Illustrations.

(a) *A* bequeaths a legacy "to Koibullo whom I have adopted," and directs his wife "to perform the ceremonies according to the Shastras and bring him up." The ceremonies are not performed, and the adoption is held invalid. The bequest, however, to Koibullo is valid, for it cannot be said in this case that the assumed fact of adoption was the reason and motive of the gift, or that it was a condition of the gift. The intention is to benefit the individual, named Koibullo. The addition of his supposed character (of adopted son) is simply a matter of description. His identification is complete, and the gift will therefore take effect, though the description (of his being an adopted son) is incorrect. In such a case it is said that Koibullo takes as a *persona designata* : *Nidhoomoni* v. *Saroda* (1876) 26 W.R. 91, 3 I.A. 253. See the Indian Succession Act, 1925, s. 76.

(b) *A* adopts a son *B*. He then executes a writing whereby he authorizes *B* to offer oblations of *pinda* and water to him and his ancestors "*by virtue of* his (*B*) being my adopted son," and then makes a bequest to him of all his property. It is found that the adoption is invalid. The bequest to *B* does not take effect, for the words "*by virtue of B* being my adopted son" show clearly that it was the intention of *A* to give his property to *B as his adopted son* : *Fanindra Deb.* v. *Rajeswar* (1885) 11 Cal. 463, 12 I.A. 72.

(*d*) *Bawani* v. *Ambabay* (1863) 1 Mad. H.C. 363; *Lakshmappa* v. *Ramava* (1875) 12 Bom. H.C. 364, 397; *Vaithilingam* v. *Natesa* (1914) 37 Mad. 529, 15 I.C. 299, ('14) A.M. 460; *Dalpatsingji* v. *Raisingji* (1915) 39 Bom. 528, 29 I.C. 943, ('15) A.B. 93; *Vaman* v. *Venkaji* (1921) 45 Bom. 829, 61 I. C. 460, ('21) A.B. 55; *Haridas Chatterji* v. *Manmatha Nath Mallik* (1937) 2 Cal. 265, 160 I.C. 332, ('36) A.C. 1.

(*e*) *Fanindra Deb* v. *Rajeswar* (1885) 11 Cal. 463, 12 I. A. 72, at p. 89.

(*f*) *Nidhoomoni* v. *Saroda* (1876) 26 W.R. 91, 3 I.A. 253; *Bireswar* v. *Ardha Chunder* (1892) 19 Cal. 452, 19 I. A. 101; *Subbarayar* v. *Subbammal* (1901) 24 Mad. 214, 27 I.A. 162; *Murari Lal* v. *Kundan Lal* (1909) 31 All 339, 1 I.C. 687; *Khub Singh* v. *Ramji Lal* (1919) 41 All. 666, 52 I.C. 311, ('19) A.A. 391; *Bai Dhondubai* v. *Laxmanrao* (1923) 47 Bom. 65, 68 I.C. 504, ('22) A.B. 352.

(*g*) (1885) 11 Cal. 463, 12 I.A. 72, *supra*; *Surendrakeshav* v. *Doorgasundari* (1892) 19 Cal. 513, 19 I.A. 108; *Lali* v. *Murlidhar* (1906) 28 All. 488, 33 I.A. 97; *Karamsi* v. *Karsandas* (1899) 23 Bom. 271,

IX.—MODE OF PROOF AND ESTOPPEL.

512. Burden of proof and evidence.—The fact of adoption must be proved in the same way as any other fact. There are no special rules of evidence to establish an adoption (*h*). But the evidence in support of an adoption must be sufficient to satisfy the very grave and serious onus that rests upon any person who seeks to displace the natural succession by alleging an adoption. That onus is particularly heavy where the adoption is made a long time after the date of the alleged authority to adopt (*i*). But when there is a lapse of 55 years between the adoption and its being questioned, every allowance for the absence of evidence to prove such fact must be favourably entertained (*j*). **Ss. 512, 513**

An *ex parte* statement made by a widow in mutation proceedings that she had authority from her husband to adopt is not admissible in evidence against the reversioners in a subsequent suit challenging the adoption either under sec. 32 (*3*) or sec. 33 of the Indian Evidence Act, 1872 (*k*).

Statements made by a testator in his will to the effect that the legatee was the adopted son of the testator can be used as evidence by the legatee in a suit for a declaration of adoption (*l*).

513. Estoppel.—(*1*) A person who is otherwise entitled to dispute an adoption may, by his declaration, act or omission, be estopped from disputing it. The rule of estoppel is laid down in s. 115 of the Indian Evidence Act, 1872. It is as follows :—

"Where one person has, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true, and to act upon such belief, neither he nor his representative shall be allowed, in any suit or proceeding between himself and such person or his representative, to deny the truth of that thing" (*m*).

(*h*) See *Huradhun* v. *Muthoranath* (1849) 4 M. I.A. 414, 425 [asquiesence]; *Chandra Kunwar* v. *Narpat Singh* (1906) 34 I.A. 27, 29 All. 184 [admission]; *Ajabsing* v. *Nanabhau* (1898) 26 I.A. 48, 3 C.W N. 130 [pedigree]; *Lal Achal Ram* v. *Kazim Husein* (1905) 32 I.A. 113, 27 All. 271 [tradition in a *wajib-ul-arz*]; *Rup Narain* v. *Gopal Devi* (1909) 36 I.A. 103, 36 Cal. 780, 3 I.C. 382 [lapse of time]; *Prem Devi* v. *Shambhu Nath* (1920) 42 All. 382, 76 I.C. 601, ('20) A.A. 322 [lapse of time]; *Puttu Lal* v. *Parbati Kunwar* (1915) 42 I.A. 155, 37 All. 359, 29 I.C. 617, ('15) A.PC. 15 [aged adopter]; *Diwakar* v. *Chandanlal* (1917) 44 Cal. 201, 39 I.C. 6, ('16) A.PC. 81 [absence of deed and of entries of expenditure on ceremonies].

(*i*) *Dal Bahadur Singh* v. *Bijai Bahadur Singh* (1930) 57 I.A. 14, 52 All. 1, 122 I.C. 8, ('30) A.PC. 79; *Balak Ram* v. *Nanun Mal* (1930) 11 Lah. 503, 128 I.C. 532, ('30) A.L. 579.

(*j*) *Ramakrishna Pillai* v. *Thirunarayana Pillai* (1932) 55 Mad. 40, 139 I C. 684, ('32) A.M. 198; *Roshen Lal* v. *Samar Nath* (1938) Lah. 173, ('37) A.L. 626.

(*k*) (1930) 57 I.A. 14, 52 All. 1, 122 I C. 8, ('30) A.PC. 79, *supra*.

(*l*) *Chandreshwar* v. *Bisheshwar* (1926) 5 Pat. 777, 101 I.C. 289, ('27) A P 61.

(*m*) *Dharam Kunwar* v. *Balwant Singh* (1912) 39 I.A. 142, 148, 34 All. 398, 15 I C. 673 [representation by a widow that she had power to adopt]; *Surendrakeshav* v. *Doorgasundari* (1892) 19 I.A 108, 128, 19 Cal. 513, 532 [no misrepresentation]; *Har Shankar* v. *Lal Raghuraj* (1907) 34 I.A. 125, 29 All. 519 [denial of adoption by person adopted]; *Dharam Prakash* v. *Kalawati* (1928) 50 All. 885, 110 I.C. 665, ('28) A.A. 459 [adoption challenged. by adoptive mother].

S. 513 (2) Estoppel operates merely as a personal disqualification, and does not bind any one who claims by an independent title (*n*).

(3) A person may be so estopped, although he was acting in good faith, or without a full knowledge of the circumstances, or was under a mistake or misapprehension (*o*).

(4) The misrepresentation to operate as an estoppel must be of a matter of fact. An erroneous expression of opinion that an adoption was valid in law cannot lead to an estoppel (*p*).

(5) Mere acquiescence in an adoption, or mere presence at an adoption, does not create an estoppel (*q*) or even subsequent conduct recognising the adoption (*r*).

J and *R* are two Hindu brothers. In 1908 *J* executes a deed purporting to adopt *D* as a son to him. *J* dies in 1912. *R* dies in 1914 leaving a daughter *S*. On *R*'s death *D* takes possession of his estate claiming to be entitled to it as *R*'s brother's adopted son. *S* sues *D* for a declaration that she is entitled to *R*'s property as his heir. *D* alleges that he was validly adopted by *J*, and that there was a giving and taking in adoption, and, further, that if there was no giving or taking, *R* was estopped from disputing his adoption by reason of certain acts and representations of his, and *S*, claiming through *R*, was also so estopped. The acts and representations alleged to lead to estoppel are (1) that *R* had brought *D* from his village and been a witness to the deed of adoption, (2) that *R* had allowed *D* to perform the cremation ceremony of *J*, and (3) that at the time of *D*'s marriage *R* had represented that he was the adopted son of *J*. *No giving or taking in adoption was proved to have taken place.* [If so, though there was an adoption *in fact* as shown by the deed of adoption, there was no valid adoption *in law*.] *Held* by the Judicial Committee that no estoppel arose under sec. 115 of the Indian Evidence Act, 1872. No estoppel can arise unless there was a misrepresentation as to a matter of fact. It is clear that there was no misrepresentation on the part of *R* as to the *fact* of the adoption. An adoption *in fact* was there. But *R* may have believed, though wrongly, that the adoption was *also valid in law*; but that creates no estoppel at all. In the course of their judgment their Lordships cited a passage from the judgment of the Judicial Committee in *Gopee Lal*'s case (*s*) which is as follows: "But it appears to their Lordships that there is no estoppel in the case. There has been no misrepresentation on the part of [*R*]. [*R*] is alleged to have represented that [*D*] was adopted. The [defendant's] case is that he was in fact adopted. So far as the *fact* is concerned there is no misrepresentation. It comes to no more than this, that [*R*] arrived at a conclusion that the adoption which is admitted in fact was valid in law, a conclusion which in their Lordships' judgment is erroneous; but that creates no estoppel, whatever between the parties": *Dhanraj* v. *Sonibai* (1925) 52 I.A. 231, 52 Cal. 482, 87 I.C. 357, ('25) A.PC. 718. [Another point taken in the case was that an estoppel

(*n*) *Dharam Kunwar* v. *Balwant Singh* (1912) 39 I.A. 142, 148, 34 All. 398, 15 I.C. 673; *Dhanraj* v. *Soni Bai* (1925) 52 I.A. 231, 243, 52 Cal. 482, 496, 87 I.C. 357, ('25) A.PC. 118.

(*o*) *Sarat Chunder* v. *Gopal Chunder* (1892) 19 I.A. 203, 215, 20 Cal. 296, 310.

(*p*) *Gopee Lall* v. *Chundraolee* (1872) I.A. Sup. Vol. 131, 133, 11 Beng. L. R 391; (1925) 52 I.A. 231, 242-243, 52 Cal. 482, 495, 87 I.C. 357, ('25) A.PC. 118, *supra*.

(*q*) *Gurulingaswami* v. *Ramalakshmamma* (1895) 18 Mad. 53, 60; *Vaithilingam* v *Muruqaian* (1914) 37 Mad. 529, 15 I.C. 299, ('14) A.M. 460.

(*r*) *Tirkangauda Mallangauda* v. *Shivappa Patil* (1943) Bom. 706, 45 Bom. L.R 992, ('44) A.B. 40.

(*s*) (1872) I. A. Sup. Vol. 131, 133, 11 Beng. L.R. 391.

in cases of adoption was purely *personal*, so that even if *R* was estopped, his daughter *S* could not be estopped. Their Lordships were inclined to this view, but they did not base their decision on that argument.]

The doctrine of factum valet in relation to adoption.—The texts relating to the capacity to give, the capacity to take, and the capacity to be the subject of adoption, are *mandatory*. Hence the principle of *factum valet* is ineffectual in the case of an adoption in contravention of the provisions of those texts (*t*).

514. Limitation.—(*1*) The period of limitation for a suit to obtain a declaration that an alleged adoption is invalid, or never in fact took place, is 6 years from the date when the alleged adoption becomes known to the plaintiff [the Indian Limitation Act, 1908, Sch. I, art. 118].

(*2*) The period of limitation for a suit to obtain a declaration that an adoption is valid is 6 years from the date when the rights of the adopted son, as such, are interfered with [the Indian Limitation Act, 1908, Sch. I, art. 119].

Art. 118 applies only to a suit under sec. 42 of the Specific Relief Act, 1877, *for a declaratory decree* that an adoption is invalid or did not take place. The article applicable to a suit by a reversioner *for possession* of immoveable property on the death of a Hindu female is art. 141 [see sec. 209 above], even if it is necessary to decide in the suit *whether an adoption was or was not valid*: *Kalyanadappa* v. *Chanbasappa* (1924) 51 I. A. 220, 48 Bom. 411, 79 I. C. 971, ('24) A. PC. 137.

X.—KRITRIMA ADOPTION.

515. Kritrima form of adoption. The *kritrima* form of adoption is prevalent in Mithila and the adjoining districts, and it is recognized by the law. Either man or woman can adopt in this form. The following are the main points of distinction between *dattaka* adoption and *kritrima* adoption:—

(1) The consent of the adopted son is necessary to the validity of the *kritrima* adoption; therefore a minor who has attained the age of discretion, may be adopted with the parent's consent. The word '*kartaputra*' indicates *kritrima* and not *dattaka* adoption (*u*).

(2) The adopted son must belong to the same caste as the adoptive father. His age and his relationship to the adoptive father are immaterial.

(*t*) *Lakshmappa* v. *Ramava* (1875) 12 Bom. H C. 364, 398; (1899) 22 Mad. 398, 26 I.A. 113, 144, *supra*; *Ganga* v. *Lekhraj* (1887) 9 All. 253, 296-297; *Gopal* v. *Hanmant* (1879) 3 Bom. 273, 293-294; *Padajirav* v. *Ramrav* (1889) 13 Bom. 160, 167 (1898) 22 Bom. 812, *supra*; *Tirkangauda Mallangauda* v. *Shivappa Patil* (1943) Bom. 706, 45 Bom. L. R. 992, ('44) A B 40.

(*u*) *Lalita Prasad* v. *Sarnam Singh* (1933) 1, 9 I C. 491, ('33) A.P. 165.

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(3) No ceremonies are necessary to the validity of a *kritrima* adoption, nor is a document necessary (*v*).

(4) A wife can adopt a *kritrima* son to *herself*, though her husband has adopted a son to himself. Similarly, a widow can adopt a *kritrima* son to *herself*. But neither a wife nor a widow can adopt a *kritrima* son to her husband, even when expressly authorized by him to do so. A wife adopting a *kritrima* son to *herself* does not require the consent of any person, not even that of her husband. A widow may adopt a *kritrima* son to *herself* without the consent of her husband's *sapindas*.

(5) A *kritrima* son does not lose his rights of inheritance in his natural family. In his adoptive family, however, he can only inherit to the person actually adopting him and to no one else (*w*). *Kartaputra*—As to kartaputra and his rights, see the undermentioned case (*x*).

(*v*) *Kamla Prasad* v. *Murli Manohar* (1934) 13 Pat. 550, 152 I. C. 416, ('34) A P. 508.

(*w*) Sarkar's Hindu Law, 7th ed., 293; Mayne's Hindu Law, section 226; Trevelyan's Hindu Law, pp. 159-161 and pp. 205-206.

(*x*) *Kanhaiya Lal* v. *Mussammat Sugakuer* (1925) 4 Pat. 824, 89 I. C. 672, ('25) A P. 611.

CHAPTER XXIV.

MINORITY AND GUARDIANSHIP.

516. Age of majority.—There is a difference of opinion among the Hindu writers as to the age of majority under Hindu law. According to some writers, minority terminates at the completion of the fifteenth year; according to others, at the completion of the sixteenth year. The former view is held in Bengal (*y*); the latter view, in other parts of British India (*z*). This difference has lost much of its importance since the passing of the Indian Majority Act, 1875, which applies to all persons domiciled in British India, and to all matters *except marriage, dower, divorce and adoption.* According to that Act, every minor of whose person or property a guardian had been appointed by any Court, and every minor of whose property the superintendence has been assumed by a Court of Wards is deemed to have attained his majority at the completion of the twenty-first year; and in all other cases, at the completion of the eighteenth year.

Marriage.—See sec. 427 above.

Adoption.—See secs. 450 and 465 above.

517. Guardians. Guardians may be divided into three classes, namely—

(1) natural guardians [ss. 518-531];

(2) guardians appointed by a father by will [s. 532]; and

(3) guardians appointed

(i) under the Guardians and Wards Act 8 of 1890 by a District Court or by a Chartered High Court in the exercise of its ordinary original civil jurisdiction; or

(ii) by a Chartered High Court in the exercise of its inherent powers [ss. 535-537].

(*y*) *Cally Churn* v. *Bhuggobutty* (1873) 10 Beng. L. R. 231 [F. B.]; *Mothoormohun* v. *Soorendro* (1876) 1 Cal. 108.

(*z*) *Shivji* v. *Datu* (1875) 12 Bom. H. C. 281, 290; *Reade* v. *Krishna* (1886) 9 Mad. 391, 397-398.

I.—NATURAL GUARDIANS.

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518. Guardianship of person and of separate property of minor.– (*1*) The father is the natural guardian of the *person* and of the *separate* property of his minor children (*a*), and next to him the mother (*b*), unless the father has by his will appointed another person as the guardian of the person of his children [s. 532].

(*2*) No relation except the parents is entitled as of right to the guardianship of a minor (*c*). Failing the father and mother, the Court may appoint the nearest male paternal kinsman, and, failing paternal kinsmen, the nearest male maternal kinsman as guardian of the minor (*d*). But the Court is not bound to do so. It may appoint a maternal relation in preference to a paternal relation, or it may even appoint a stranger, if the welfare of the minor requires it (*e*).

(*3*) The Court has *no power* to appoint a guardian of the person of a minor whose father is living and is not, in the opinion of the Court, unfit to be guardian of the person of the minor (*f*).

(*4*) The provisions of this section apply

(i) to the custody of the *person* of a minor, whether governed by the Mitakshara law or the Dayabhaga law;

(ii) to the custody of the *separate* property of a minor, as distinguished from his undivided interest in coparcenary property, in cases governed by the Mitakshara law; and

(iii) to the custody of the *separate* property of a minor as well as his *undivided interest* in coparcenary property in cases governed by the Dayabhaga law [s. 279].

As to the custody of the undivided interest of a minor in cases governed by the Mitakshara law, see sec. 519 below.

(*a*) *Nanabhai* v. *Janardhan* (1888) 12 Bom. 110, 120 : *Venkateswaran* v. *Saradambal* (1935) Rang. 590, 160 I. C. 878, ('36) A. R. 67.

(*b*) *Kaulesra* v. *Jorai* (1906) 28 All. 233 ; *Rangubai* v. *Gopal* (1903) 5 Bom. L. R. 542.

(*c*) *Subbarami Reddi* v. *Chencharaghava Reddi* (1945) Mad. 1714

(*d*) *Gulbai, In re* (1908) 32 Bom. 50.

(*e*) *Kristo Kissor* v. *Kadermoye* (1878) 2 Cal L. R. 583 ; *Mst. Bhikuo Koer* v. *Chamela Koer* (1897) 2 C. W. N. 191 (1908) 32 Bom. 50, *supra* ; *Thayammal* v. *Kuppanna* (1915) 38 Mad. 1125, 26 I.C. 179, ('15) A. M. 659 ; Guardians and Wards Act, 1890, s. 17 ; *Emperor* v. *Sital Prasad* (1920) 42 All. 146, 54 I. C. 402, ('19) A.A. 30 [Kidnapping].

(*f*) Guardians and Wards Act 8 of 1890, sec. 19, cl. (b). See *Besant* v *Narayaniah* (1914) 41 I. A. 314, 324, 38 Mad. 807, 822, 24 I. C. 290, ('14) A.PC. 41.

Father's right.—" As in this country [England] so among the Hindus the father is the natural guardian of his children during their minorities, but this guardianship is in the nature of a sacred trust, and he cannot therefore during his lifetime substitute another person to be guardian in his place. He may, it is true, in the exercise of his discretion as guardian, entrust the custody and education of his children to another, but the authority he thus confers is essentially a revocable authority, and if the welfare of his children requires it, he can, notwithstanding any contract to the contrary, take such custody and education once more into his own hands. If, however, the authority has been acted upon in such a way as, in the opinion of the Court exercising the jurisdiction of the Crown over infants, to create associations or give rise to expectations on the part of the infants which it would be undesirable in their interests to disturb or disappoint, such Court will interfere to prevent its revocation " (*g*). **Ss. 518, 519**

Mother's right.—When the father is alive, he is entitled to the custody of his minor child, however young it may be, in preference to the mother (*h*).

Capacity of minor to act as guardian.—A minor is incompetent to act as guardian of any minor except his own wife or child [the Guardians and Wards Act, 1890, sec. 21].

Adoptive father.—Where a widow adopts a son to her husband under an authority given to her by his will, the natural father should not, on the death of the adoptive mother, be appointed guardian of the person of his son where there are other suitable members of the adoptive father's family available and where the effect of appointing the natural father would be to frustrate the intention of the adoptive father expressed by him in his will (*i*).

519. Guardianship of property where family is joint.— If the minor is a member of a joint family governed by the Mitakshara law, the father as *karta* (manager) is entitled to the management of the whole coparcenary property including the minor's interest. After the father's death, the management of the property, including the minor's interest therein, passes to the eldest son as *karta* [s. 236]. The mother is not entitled to the custody of the undivided interest of her minor son in the joint property, because such property is not separate property, though she is entitled to the custody of his person and of his separate property, if any (*j*). If all the sons are minors, the Court may appoint a guardian of the whole of the joint property until one of them attains majority (*k*). Specially when the widows of the father were quarrelling among themselves (*l*). On any one of the sons attaining majority, the guardianship of the property constituted by the Court ceases, and the Court is bound to hand over the joint family property to the

(*g*) *Besant* v. *Narayaniah* (1914) 41 I. A. 314, 320-321, 38 Mad. 807, 819, 24 I. C. 290, ('14) A.PC. 41; *Sukhdeo* v. *Ram Chander* (1924) 46 All. 706, 83 I. C. 24, ('24) A. A. 622.

(*h*) *Empress* v. *Prankrishna* (1882) 8 Cal. 969.

(*i*) *Monomohini Dasi* v. *Hari Prasad* (1925) 4 Pat. 109, 81 I. C. 1045 ('25) A. P 445.

(*j*) *Gharib Ullah* v. *Khalak Singh* (1903) 25 All. 407, 30 I. A. 165, *Gourah* v. *Gujadhur* (1880) 5 Cal. 219, *Virupakshappa* v. *Nilganga* (1895) 19 Bom. 309 [F.B.], *Shama Kuar* v. *Mohanunda* (1892) 19 Cal. 301.

(*k*) *Bindaji* v. *Mathurabai* (1906) 30 Bom. 152.

(*l*) *Seethabai* v. *Narasimha* (1945) Mad. 568.

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adult son, notwithstanding the fact that the other sons are minors (*m*). See secs. 535-537 below.

Illustrations.

(a) *H*, a Hindu governed by the Mitakshara law, dies leaving two sons *A* and *B* and a widow, the mother of *B*. *A* is an adult, but *B* is a minor. After the death of *H*, it is competent to *A* and *B* to live as members of a joint Mitakshara family, or to partition the property inherited by them from their father. If they adopt the former course, *A* as the senior male member is entitled to manage the whole joint property, including the minor's undivided interest therein. *B*'s mother is not entitled to be appointed guardian of the undivided interest of her son *B* in the joint property, for such interest is not separate property. But she may be appointed guardian of *B*'s person and of his separate property, if any. If *A* and *B* partition the property inherited by them from their father, then *B*'s mother is entitled to the custody of the share allotted to *B* on partition, such share being his separate property [sec. 223, sub-sec. (4)]: *Gourah* v. *Gujadhur* (1880) 5 Cal. 219.

(b) If in the case put in ill. (a), *A* also is a minor, the Court may appoint a guardian of the whole joint property under the Guardians and Wards Act, 1890, and the Court may in such a case appoint even *B*'s mother as such guardian: *Bindaji* v. *Mathuraba* (1905) 30 Bom. 152. But the guardianship of the individual appointed by the Court ceases when *A* attains majority, and the management of the whole property will then vest in him as *karta*: *Ramchandra* v. *Krishnarao* (1908) 32 Bom. 259.

Capacity of minor to act as guardian.—There is no rule of Hindu law that the managing member of an undivided family should be an adult. He may be a minor in which case he is competent to act as guardian not only of his own wife and children but also the wife and children of another minor member of the family [the Guardians and Wards Act, 1890, sec. 21.]

520. Guardianship of a married female.—See section 443 above.

521. Guardianship of an adopted son.—The guardianship of an adopted son who is a minor passes on his adoption from his natural father and mother to his adoptive father and mother (*n*).

522. Guardianship of illegitimate children.—The mother is the lawful guardian of her illegitimate children (*o*). Where the father is known, he has the preferential right (*p*).

523. Re-marriage of mother.—A Hindu widow does not by the mere fact of her re-marriage lose her right of

(*m*) *Ramchandra* v. *Krishnarao* (1908) 32 Bom. 259: *Chandrapal Singh* v. *Sarabjit Singh* (1936) 11 Luck. 67, 154 I. C. 855, ('35) A. O. 334.

(*n*) *Sreenarain* v. *Kishen* (1873) 11 Beng. L. R. 171, 19 I.A. Sup. Vol. 149, 163; *Lakshmibai* v. *Shridhar* (1879) 3 Bom. 1. See also *Narcanaya* v. *Nircanaya* (1885) 9 Bom. 365.

(*o*) *Venkamma* v. *Savitramma* (1889) 12 Mad. 67, 68; *Saithri, in the matter of* (1892) 16 Bom. 307, 317.

(*p*) *Prem Kuer* v. *Banarsi Das* (1934) 15 Lah. 630, 150 I.C. 87, ('34) A. L. 1003.

guardianship, in any case where re-marriage is recognized by the custom of the caste to which she belongs (*q*). **Ss. 523-526**

See The Hindu Widows Re-marriage Act, 1856; secs. 3 and 5.

524. Loss of caste.—Under the Hindu law, loss of caste entailed a loss of the right of guardianship of the person and property of minors (*r*). But it is no longer so since the passing of the Caste Disabilities Removal Act, 1850 (*s*).

This act contains only one section which runs as follows :—

"So much of any law or usage now in force [in British India] as inflicts on any person forfeiture of rights or property by reason of his or her renouncing, or having been excluded from the communion of any religion, or being deprived of caste, shall cease to be enforced as law [in British India.]"

As to change of religion, see secs. 525-526.

525. Change of religion by father.—The fact that a father has changed his religion is of itself no reason for depriving him of the custody of his children (*t*). But if at the time of conversion, the father voluntarily abandons his parental rights, and entrusts the custody of his child to another person in order that it may be maintained and educated by him, the Court will not restore back the custody of the child to the father, if such a course is detrimental to the interests of the child. In such a case the Court should be guided by what it conceives to be best for the welfare and well-being of the child (*u*).

See notes to sec. 524.

526. Change of religion by mother.—A child in India, under ordinary circumstances, must be presumed to have his father's religion, and his corresponding civil and social status; and it is, therefore, ordinarily and in the absence of controlling circumstances, the duty of a guardian to train his infant ward in such religion. Therefore, where a Hindu mother changes her religion, the Court may, if it is in the interest of the minor, remove the child from the custody of the mother, and place the child under a Hindu guardian (*v*).

(*q*) *Ganga* v. *Jhalo* (1911) 38 Cal. 862, 10 I. C. 69; *Mst. Indi* v. *Ghania* (1920) 1 Lah. 146, 53 I. C. 783, ('19) A. L. 40; *Pallabhai* v. *Mahadu* (1909) 33 Bom. 107, 144, 1 I. C. 659. But see *Panchappa* v. *Sanganbasava* (1900) 24 Bom. 89, 91; *Mt. Ram Labhai* v. *Durga Das* (1934) 15 Lah. 28, 147 I.C. 19, ('33) A. L. 817.

(*r*) Strange's Hindu Law, vol. I, p. 160.

(*s*) *Kanahi Ram* v. *Biddya Ram* (1878) 1 All. 549; *Kunlesia* v. *Joran* (1906) 28 All 233.

(*t*) Act 21 of 1850; *Muchoo* v. *Arzoon* (1866) 5 W. R. 235; *Shamsing* v. *Santabai* (1901) 25 Bom. 551, 555.

(*u*) *Mokoond* v. *Nobodip* (1898) 25 Cal 881; *Joshy Assam, in the matter of* (1896) 23 Cal. 290.

(*v*) *Skinner* v. *Orde* (1871) 14 M. I. A 309, 323.

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527. Change of religion by minor.– Where a Hindu child, who has become a convert to Christianity or any other religion, leaves his parents, and proceedings are instituted by the parents for the custody of the child, the question arises as to what is the true principle by which the Courts should be guided in such cases. Is it that the minor, if he is old enough to form an intelligent preference, should be allowed to exercise his own discretion as to where he will go ? Or, is it that the parents are entitled as of right to the custody of the child, irrespective of his wishes ? Or is it that the Court should in each case do what it conceives to be for the welfare and interest of the child ? The first view was taken in the earliest decisions on the subject. Then came a series of cases in which the second view was taken (*w*). The last view is the one now taken by the High Courts of Bombay (*x*), Calcutta (*y*), and Allahabad (*z*).

POWERS OF NATURAL GUARDIAN.

528. Alienations by natural guardian.– The natural guardian of a Hindu minor has power, in the management of his estate, to mortgage or sell any part thereof *in a case of necessity* or *for the benefit of the estate* (*a*). If the alienee does not prove any legal necessity or that he made reasonable enquiries, the sale is invalid (*b*). The power of a manager of a joint family to make a suitable provision in connection with the marriage of a daughter of the family in the shape of a gift of a small portion of the family property cannot be exercised by a widow, acting as guardian of her son, who is the owner of the property (*c*).

In *Hunooman Persaud V. Mussummat Babooee* (*d*), which is the leading case on the subject, the Judicial Committee said :—

" The power of the manager for an infant heir to charge an estate not his own, is, under the Hindu law, a limited and qualified power. It can only be exercised rightly *in a case of need* or *for the benefit of the estate*....... *The actual pressure on the estate, the danger to be*

(*w*) *The Queen* v. *Nesbitt* (1853) Perry's O.C. 103 ; *Reade* v. *Krishna* (1886) 9 Mad. 391.

(*x*) *Saithri, in the matter of* (1892) 16 Bom. 307.

(*y*) See *Joshy Assam, in the matter of* (1896) 23 Cal. 290 ; *Mokoond* v. *Nobodip* (1898) 25 Cal. 881.

(*z*) *Sarat Chandra* v. *Forman* (1890) 12 All. 213.

(*a*) *Hunooman Persaud* v. *Mussumat Babooee* (1856) 6 M. I. A. 393, 412 [mortgage by mother upheld]; *Soonder Narain* v. *Bennud Ram* (1879) 4 Cal. 76 [sale by mother for legal necessity upheld] ; *Bai Amrit* v. *Bai Manik* (1875) 12 Bom. H. C. 79 [sale by mother upheld] ; *Murari* v. *Tayana* (1896) 20 Bom. 286 [sale by mother of two plots of land—sale of one upheld and that of the other set aside as not being one for legal necessity] ; *Kandhia Lal* v. *Muna Bibi* (1898) 20 All. 135 [mortgage by mother not upheld as not being one for necessity] ; *Raghubans* v. *Indarjit* (1923) 45 All. 77, 69 I.C. 683, ('22) A. A. 526 [mortgage by mother upheld in part] ; *Ragho* v. *Zaga* (1929) 53 Bom. 419, 118 I.C. 545, ('29) A. B. 251 [sale by guardian of his own property and that of minor's property—*one* piece of land purchased with sale proceeds of both properties—sale of minor's property not upheld].

(*b*) *Mallappa* v. *Anant Balkrishna* (1937) Bom. 59, 38 Bom. L. R. 941, 166 I.C. 154, ('36) A. B. 386.

(*c*) *Palaniammal* v. *Kothandarama Goundan* (1944) Mad. 418.

(*d*) (1856) 6 M.I.A. 393, 423.

averted, or the benefit to be conferred upon it, in the particular instance, is the thing to be regarded......Their Lordships think that the lender is bound to enquire into the necessities for the loan, and to satisfy himself as well as he can, with reference to the parties with whom he is dealing, that the manager is acting in the particular instance for the benefit of the estate. But they think that if he does so inquire, and acts honestly, the real existence of an alleged, sufficient and reasonably credited necessity is not a condition precedent to the validity of his charge, and they do not think that, under the circumstances, he is bound to see to the application of the money." **S. 528**

Alienation by natural guardian without legal necessity.- Where the mother of a minor as his natural guardian mortgages the minor's property for a legal necessity, and afterwards sells the property *before* the due date of payment of the mortgage amount, the sale itself is one without legal necessity though she applies part of the purchase money in payment of the mortgage debt. The minor therefore is entitled to set aside the sale subject, however, to payment to the purchaser of the amount applied towards payment of the mortgage debt, his estate having benefited to that extent (*e*). In the case of a mortgage, by the guardian, of the minor's estate for the purpose of defraying the expenses of the minor's marriage performed in violation of the Child Marriage Restraint Act it was held that there was no legal necessity to support the mortgage (*f*).

For the benefit of the estate.—" Mere increase in the immediate income of the minor or of his estate does not necessarily justify the inference that the particular transaction is 'for the benefit of the estate' within the meaning of this rule, which could hardly have been intended to include cases of speculative development of estates of minors" (*g*). When the only circumstance relied on, in justification of the sale is that the price realised is much more than the normal value of the property, the sale cannot be regarded as one for the benefit of the estate (*h*). A mortgage by a mother of the property of her minor son to secure a loan to carry on a trade on behalf of the minor which was not ancestral is not a transaction for the benefit of the minor (*i*). Nor a sale for the sole purpose of investing the price so as to bring in a large income (*j*). See sec. 243A.

Burden of proof.—The burden of proof on the alienee is the same as that in the case of an alienation by the manager (*k*). See sec. 244 above.

The Guardians and Wards Act, 1890.- Where a guardian is appointed of the property of a Hindu minor under the Guardians and Wards Act, 1890, he cannot alienate the immoveable property of the minor *without* the sanction of the Court, not even in a case of necessity. If he does so, the alienation is voidable at the option of the minor (*l*). Where a Court has sanctioned the alienation under the Guardian and Wards Act, the alienee can rely upon the order of the Court and need not prove the actual legal necessity. The omission of the mention of any legal necessity in the order is only an irregularity (*m*). The powers, however, of the natural guardian of a Hindu minor are larger than those of a guardian appointed under that Act : a natural guardian may alienate the minor's property even without the sanction of the Court, provided the alienation is one for necessity or for the benefit of the estate. The Guardians and Wards Act, 1890, does not alter or affect the rights of natural guardians under the Hindu law (*n*). But once a guardian

(*e*) *Pandharinath* v. *Ramchandra* (1931) 33 Bom. L. R. 104, 130 I. C. 594, ('31) A. B. 157.

(*f*) *Ram Jash Agarwala* v. *Chand Mandal* (1937) 2 Cal. 764.

(*g*) *Krishna Chandra* v. *Ratan Ram* (1915) 20 C. W. N. 645, 647, 35 I.C. 673, ('16) A. C. 840 : *Hemraj* v. *Nathu* (1935) 59 Bom. 525, 157 I. C. 406, ('35) A. B. 295 [F.B.].

(*h*) *Hemraj* v. *Nathu* (1935) 59 Bom. 525, 157 I.C. 406, ('35) A.B. 295 [F.B.].

(*i*) *Punnayyah* v. *Viranna* (1922) 45 Mad. 425, 70 I. C. 668, ('22) A. M. 273.

(*j*) *Ragho* v. *Zaga* (1929) 53 Bom. 419, 118 I. C. 555, ('29) A.B. 139.

(*k*) *Kandhia Lal* v. *Muna Bibi* (1898) 20 All. 135; *Raghubans* v. *Indarjit* (1923) 45 All. 77, 69 I. C. 683, ('22) A. A. 526.

(*l*) Guardians and Wards Act, 1890, ss. 29-30; *Sivana* v. *Munisami* (1899) 22 Mad. 289; *Tejpal* v. *Ganga* (1903) 25 All. 59 [where the guardian appointed by the Court was also the natural guardian].

(*m*) *Balaji Vasudeo* v. *Sadashiv Kashinath* (1937) Bom. 1, 38 Bom. L. R. 796, 165 I. C. 530, ('36) A. B. 389.

(*n*) *Ramchander* v. *Brojonath* (1879) 4 Cal. 929 [F.B.]; *Kanti Chunder* v. *Bisheswar* (1898) 25 Cal. 585 [F. B.]; *Manishankar* v. *Bai Mule* (1888) 12 Bom. 686; *Sham Das* v. *Umer Din* (1930) 11 Lah. 312, 126 I. C. 788, ('30) A. L. 497.

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has been appointed by the Court, the rights of the natural guardian are extinguished (*o*).

Limitation.—A suit by a ward who has attained majority to set aside a transfer of property by his guardian must be brought within three years from the date when the ward attains majority; the Indian Limitation Act, 1908, Sch. I, art. 44. A transfer by a guardian is not void, but voidable at the instance of the ward (*p*).

Alienation by manager of joint family of undivided interest of minor coparceners.—See secs. 242 to 244.

529. Contracts by natural guardian.—(*1*) The natural guardian has power to enter into contracts and to do all other acts which are reasonable and proper for the protection or benefit of the minor's property and for the advantage of the minor (*q*). A decree can be passed against a minor's estate on a deed of maintenance executed by the guardian in favour of the minor's paternal grand-mother (*r*). But the guardian cannot in any case bind the minor by a personal covenant (*s*) though the minor's estate may be liable (*t*) [ill. (a)]. Even on a promissory note executed by a guardian intending to exclude his own liability and to make the minor's estate liable, a decree may be passed against the estate if the debt is otherwise binding (*u*). Though this was doubted (*v*), it is now approved by a Full Bench (*w*).

(*2*) It is not within the competence of the manager of a minor's estate or within the competence of a guardian of a minor to bind the minor or the minor's estate by a *contract for the purchase* of immoveable property for the minor (*x*) [ill. (b)]. If the purchase is completed, but with borrowed money, and it appears that there was no necessity to borrow the money or to buy the property, the lender is not entitled, in a suit to recover the money, to a decree against the minor personally or against his estate, after his death, though he is entitled to a decree for sale of the property and for payment of the loan out of the proceeds of sale of that property (*y*).

(*o*) *Arumugam* v. *Duraisinga* (1914) 37 Mad. 38, 12 I. C. 568, ('14) A. M. 648.

(*p*) *Laxmana* v. *Rachappa* (1918) 42 Bom. 626, 46 I. C. 22, ('18) A. B. 180; *Fakirappa* v. *Lumanna* (1920) 44 Bom. 742, 58 I. C. 257, ('20) A. B. 1; *Brojendra* v. *Prosanna Kumar* (1920) 21 C.W.N. 1016, 59 I.C. 589, ('20) A. C. 770. *Labha Mal* v. *Malak Ram* (1925) 6 Lah. 417, 89 I. C. 602, ('25) A. L. 619; Contra *Bachchan Singh* v. *Kamta Prasad* (1910) 32 All. 392, 5 I. C. 585.

(*q*) *Subramania* v. *Arumuga* (1903) 26 Mad. 303; *Sundararaja* v. *Pattana Thusami* (1894) 17 Mad. 306; *Sonu* v. *Dhondu* (1904) 28 Bom. 330; *Krishna* v. *Nagamani* (1916) 39 Mad. 915, 30 I. C. 574, ('16) A. M. 677 [promissory note by guardian].

(*r*) *Kondapalli Sudarsan Rao* v. *Putta Dalayya* (1941) Mad. 218.

(*s*) *Waghela* v. *Sheikh Masludin* (1887) 11 Bom. 551, 14 I. A. 89; *Ranmalsinghji* v. *Vadilal* (1896) 20 Bom. 61, 70; *Surendra Nath* v. *Atul Chandra* (1907) 34 Cal. 892; *Lala Narain Das* v. *Ramanuj* (1898) 20 All. 209, 25 I. A. 46.

(*t*) *Suchit Chandhury* v. *Harnandan Singh* (1933) 12 Pat. 112, 142 I.C. 38, ('33) A.P. 29.

(*u*) *Meenakshisundaran Chetty* v. *Ranga Ayyangar* (1932) 139 I. C. 383, ('32) A. M 696.

(*v*) *Swaminatha Odayar* v. *Natesa Ayyar* (1933) 56 Mad. 879, 145 I. C. 716, ('33) A.M. 710.

(*w*) *Satyanarayana* v. *Mallayya* (1935) 155 I. C. 581; *Ramanathan* v. *Palaniappa* ('39) Mad. 770; *Annamalai* v. *Muthusamy* ('39) A.M. 538.

(*x*) *Mir Sarwarjan* v. *Fakrudin* (1912) 39 Cal. 223, 39 I.A. 1, 6, 13 I. C. 331.

(*y*) *Burrayya* v. *Ramayya* (1924) 47 Mad. 449, 78 I. C. 90, ('29) A. M. 472.

In general a claim for specific performance of a contract to sell the joint family property entered into by the manager will not be decreed against the minors. But if fresh property has been purchased with the amount realised and the minor takes a share in the property so acquired, he will not be allowed to repudiate the contract (z). S. 529

(3) No act done by a person who is the guardian of a minor binds the minor, unless the act was done by him in his capacity of guardian. It is a question of fact in each case whether a particular act done by a person was done by him in his capacity of guardian or on his own behalf and on his own account. In the former case, the act binds the minor, provided it was otherwise within the power of the guardian; in the latter case, it does not. The mere fact that the name of the minor is not mentioned in a contract, or in a deed of sale or mortgage, is not conclusive proof that the transaction was not entered into on behalf of the minor. In each case, the language of the document and the circumstances in which it was executed must be considered (a) [ill. (c)].

Illustrations.

(a) The mother of a Hindu boy, *M*, acting as his guardian, sells property belonging to the minor for purposes of necessity free of all Government claims for revenue. The deed of sale contains a covenant binding the minor and his heirs to indemnify the purchaser against any claims for revenue which the Government might make at any future time. Some time after the sale, the Government assess the land. The purchaser sues *M*, who has then attained majority, upon the covenant contained in the deed. *M* is not liable on the covenant, the covenant being a personal one. Such a covenant is not valid and binding on a minor either under the English law or the Indian law: *Waghela* v. *Shekh Masludin* (1887) 11 Bom. 551, 14 I.A. 89. See sub-sec. (1).

(b) *A*, as guardian of the estate of a minor, *B*, agrees to purchase immoveable property from *C*, on behalf of *B*. *B* on attaining majority sues *C* for specific performance. *B* is not entitled to specific performance, nor is *C*. See sub-sec. (2).

(c) *A* dies leaving a widow, *W*, and a minor son, *M*. After *A*'s death *W* enters into possession of the property left by *A*, and manages the same as guardian of *M*. After some time, in consequence of certain disputes, *G* applies to the Court to be appointed guardian of the person and property of *M*, and he is appointed such guardian. Before *G* can obtain possession of *M*'s property from *W*, *W* sells the property to *P* for Rs. 400, and conveys the property to *P* *as her own property and not as that of the minor.* Out of the Rs. 400, she applies Rs. 200 in satisfying a decree against the estate of her deceased husband, and the rest she spends for her own maintenance. *M* attains majority, and

(z) *Sohan Lal* v. *Atul Nath* (1934) 56 All. 142, 148 I. C. 229, ('33) A.A. 846.

(a) *Indur Chunder* v. *Radhakishore* (1892) 19 Cal. 507, 19 I.A. 90 [renewal of lease]; *Nathu* v. *Balwantrao* (1903) 27 Bom. 390 [sale by mother]; *Murari* v. *Tayana* (1896) 20 Bom. 286, 288; *Watson & Co.* v. *Sham Lal* (1887) 14 I. A. 178, 15 Cal. 8; *Nandan Prasad* v. *Abdul Aziz* (1923) 45 All. 497, 74 I. C. 367, ('23) A. A. 581 [mortgage by mother as full owner]. See also *Balwant Singh* v. *Clancy* (1912) 39 I. A. 109, 34 All. 296, 14 I.C. 629 [sale by brother].

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sues *P* to recover the property from him. The sale is void altogether, and *M* is entitled to recover the property. The sale being absolutely void, *P* is not entitled to a return of any part of the purchase money, not even of the Rs. 200 applied by *W* in payment of debts binding on the estate and therefore on *M* : *Nathu* v. *Balwantrao* (1903) 27 Bom. 390. See sub-sec. (*3*).

(d) A decree obtained by a creditor against a Hindu wife in a suit to recover money lent to her to discharge her husband's debts whilst the husband was in jail, is binding on the son though he was not a party to the suit. *Tara Kiran* v. *Hari* (1928) 50 All. 447, 108 I.C. 114, ('28) A.A. 251.

530. Compromise by natural guardian.—It is competent to a guardian to enter into a compromise on behalf of his ward (*b*).

531. Acknowledgment of debt by guardian.—Before the enactment of the Indian Limitation Act, 1908, there was a conflict of decisions on this point. According to Bombay (*c*) and Madras (*d*) decisions, the natural guardian of a minor as well as a guardian appointed under the Guardians and Wards Act, 1890, had the power to acknowledge a debt or to pay interest on a debt so as to extend the period of limitation, provided the act was for the protection or benefit of the minor's property ; but he had no power to revive a debt which was barred by limitation. According to Calcutta decisions, a natural guardian or a guardian appointed under the said Act had no power even to acknowledge a debt or to pay interest on a debt so as to extend the period of limitation (*e*). This conflict has been set at rest by sec. 21 (*1*) of the Indian Limitation Act, 1908, by which a lawful guardian is included in the expression, "agent duly authorized in this behalf," occurring in secs. 19 and 20 of the Act.

See the Limitation Act, 1908, secs. 19, 20 and 21, and the Indian Contract Act, 1872, sec. 25.

II.—TESTAMENTARY GUARDIANS.

532. Guardians appointed by will.—(*1*) A Hindu father may, by word of mouth or by writing, nominate a guardian for his children, so as to exclude even the mother from the guardianship (*f*). The mother, however, has not the power to appoint a guardian by will (*g*), but the Court may have regard to her wishes, if any, expressed in her will.

(*b*) *Nirvanaya* v. *Nirvanaya* (1885) 9 Bom 365.

(*c*) *Annapagauda* v. *Sangadiyyapa* (1902) 26 Bom. 221, 234 [F.B.].

(*d*) *Sobhanandri* v. *Sriramulu* (1893) 17 Mad. 221 ; *Subramania* v. *Arumuga* (1903) 26 Mad. 330, 331.

(*e*) *Wajibun* v. *Kadir Buksh* (1886) 13 Cal 292, 295 ; *Chhato Ram* v. *Bilto Ali* (1899) 26 Cal. 51, 52.

(*f*) *Debanand* v. *Anandmani* (1921) 43 All. 213, 59 I.C. 909, ('21) A.A. 346. See also *Jagannadha* v. *Ramayamma* (1921) 44 Mad. 189, 62 I.C. 437, ('21) A.M. 132 [guardian of son to be adopted] ; *Budhulal* v. *Morarji* (1907) 31 Bom. 413.

(*g*) *Venkayya* v. *Venkata* (1898) 21 Mad. 401.

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(2) The power of a testamentary guardian to deal with property belonging to his ward is subject to the restrictions imposed by the will (*h*).

(3) As regards guardianship of joint family property, there is a conflict of opinion whether the father of a joint family consisting of himself and his minor sons has power to appoint a guardian by his will of *the joint property* during the minority of the sons. In an earlier Bombay case, it was held that he had no such power (*i*). In a later Bombay case, it was held that he had the power to appoint such guardian and also to authorize him to alienate the joint property, and that, where an alienation was made, it was binding on the minor sons, provided it was within the scope of the authority conferred upon him by the will (*j*). A Full Bench of the Bombay High Court has now adopted the earlier view (*k*). In Madras, it has been held by a Full Bench that it is not competent to the manager of a joint Hindu family, whether he is the father or uncle or an elder brother, to appoint a testamentary guardian to the *joint property* (*l*). It is submitted that the father has no power to appoint a guardian by his will of joint family property. At the moment of his death the property passes by survivorship to his minor sons, and he cannot by any testamentary direction authorize any person to deal with it during the minority of the sons. But it has been held by the same High Court that if the testator has no sons, he may by his will authorize his widow to adopt a son to him, and appoint a guardian to manage his estate during the minority of the adopted son (*m*). The decision would no doubt be correct if the property disposed of by will was the self-acquired property of the testator. But it would be questionable, if the property disposed of was ancestral.

See the Guardians and Wards Act, 1890, secs. 6, 7, 17 (2) and 39.

The Court is bound, in appointing a guardian, to have regard to the wishes of the father contained in his will, although probate of the will has not been obtained (*n*).

The judgment in the later Bombay case [38 Bom. 94], referred to in sub-sec. (3), proceeds on the ground of convenience. The judgment in the Madras case proceeds upon the ground that since a Hindu cannot dispose of *coparcenary* property by will, he

(*h*) Guardians and Wards Act, 1890, s. 27.

(*i*) *Harilal* v. *Mani* (1905) 29 Bom. 351.

(*j*) *Mahableshwar* v. *Ramchandra* (1914) 38 Bom. 94, 21 I C. 350. ('14) A B 300 *Soobah Pirthee Lal* v. *Soobah Doorgah Lal* (1867) 7 W.R. 73, at p. 75. See also *Venkatraman* v. *Janardhan* (1928) 52 Bom. 16, 28, 30, 106 I.C. 79. ('28) A B. 8.

(*k*) *Brijbhukan Das* v. *Ghasiram* (1935) 59 Bom. 316, 155 I C. 12, ('35) A B 124 [F B]

(*l*) *Chidambara* v. *Rangasami* (1918) 41 Mad. 561, 45 I.C. 905, ('19) A M. 1046 [F B].

(*m*) *Jagannadha* v. *Ramayamma* (1921) 44 Mad. 189, 62 I C. 437, ('21) A.M. 132.

(*n*) *Sarala Sundari* v. *Hazari Dasi* (1915) 42 Cal. 953, 28 I C 972, ('16) A.C 324 [will made by husband containing directions about guardianship of his minor wife].

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cannot make arrangements for the management of that property by will after his death, or appoint a guardian to manage that property (*o*).

Transfer of power of management by father.—Where the father of a joint family consisting of himself and his minor sons appointed his nephew to manage the joint family property for a period of thirteen years, and the manager was under the arrangement liable only to pay a fixed sum in lieu of actual income, and the father died before the expiry of the period, it was held that the sons were not bound by the arrangement and that the manager was liable to account for the whole of the income after the father's death (*p*).

III.—GUARDIANS APPOINTED BY THE COURT.

533. Power of Court to appoint guardian.—(*1*) Where the Court is satisfied that it is for the welfare of a minor that an order should be made appointing a guardian of his person or property, or both, the Court may make an order under the Guardians and Wards Act, 1890, appointing a guardian. (See sec. 4 (*4*) and (*5*), and sec. 7 of the Act). Where the father has appointed a testamentary guardian, the Court has no power to appoint a guardian under sec. 7 of the Guardian and Wards Act (*q*).

A father being the natural guardian of his minor son cannot be appointed guardian of the person of the son and no order under sec. 7 is necessary (*r*).

(*2*) Nothing in the Guardians and Wards Act, 1890, shall affect, or in any way derogate from, or take away any power possessed by a Chartered High Court. See sec. 3 of the Act.

534. Guardian of person.—(*1*) In appointing the guardian of a minor, the Court shall be guided by what, consistently with the law to which the minor is subject [s. 518], appears in the circumstances to be for the welfare of the minor.

(*2*) In considering what will be for the welfare of the minor, the Court shall have regard to the age and sex of the minor, the character and capacity of the proposed guardian and his nearness of kin to the minor, the wishes, if any, of a deceased parent, and any existing or previous relations of the proposed guardian with the minor or his property.

(*3*) If the minor be old enough to form an intelligent preference, the Court may consider that preference.

See the Guardians and Wards Act, 1890, sec. 17.

535. Guardian of minor's separate property.—The only property of a minor of which a guardian can be appointed under the Guardians and Wards Act, 1890, is the *separate* property of the minor. A guardian cannot be appointed

(*o*) *Chidambara* v. *Rangasami* (1918) 41 Mad. 561, 570, 572, 45 I.C. 905, ('19) A. M. 1046 [F.B.].

(*p*) *Venkatraman* v. *Janardhan* (1928) 52 Bom. 16, 106 I.C. 79, ('28) A.B. 8.

(*q*) *Amirthavalliammal* v. *Siromani Ammal* (1938) Mad. 757.

(*r*) *Venkateswaran* v. *Saradambal* (1935) 13 Rang. 590, 160 I. C. 878, ('36) A. R. 67.

under that Act of the *undivided interest* of a minor in coparcenary property in cases governed by the Mitakshara law. The reason is that the interest of a member of a joint Mitakshara family is not separate or individual property (*s*). See sec. 519 above. **Ss. 535-537**

536. Alienation by guardian appointed under the Guardians and Wards Act, 1890.—A guardian appointed by the Court under the Guardians and Wards Act, 1890, has no power to alienate the minor's property without the previous permission of the Court. An alienation without such permission is voidable at the instance of the minor and other persons affected thereby. [See secs. 29 and 30 of the Act.] Where an alienation is made with the permission of the Court it cannot be impeached by the minor or any other person except in a case of fraud or underhand dealing. The reason is that the alienee is entitled to trust to the order of the Court, and he is not bound to inquire as to the expediency or necessity of the alienation for the benefit of the minor's estate (*t*). See sec. 519 above.

537. Guardian of minor's undivided coparcenary interest.—Although a guardian cannot be appointed of the *undivided interest* of a minor in joint family property under the Guardians and Wards Act, 1890, a Chartered High Court may, in the exercise of its *inherent power*, appoint the managing member of the family to be guardian of such interest where such appointment is clearly for the benefit of the minor, with power to him to alienate the joint family property including the minor's interest therein, and, where the property is to be sold, impose conditions upon the managing member to secure the minor's share of the proceeds of the sale. This is the practice in Bombay (*u*) and Calcutta (*v*). In a recent Allahabad case, the High Court, while holding that it had the power to appoint a guardian, refused to do so on grounds of inexpediency and want of precedent (*w*). See sec. 519 above.

(*s*) *Gharib-ullah* v. *Khalak Singh* (1903) 25 All. 407, 416, 30 I. A. 165, 170; *Kajikar* v. *Maru* (1909) 32 Mad. 139, 1 I.C. 199.

(*t*) *Gangapershad* v. *Maharani Bibi* (1884) 11 Cal. 379, 383-384, 12 I.A. 47, 49-50 [mortgage]; *Sikher Chund* v. *Dulputty* (1880) 5 Cal. 363 [sale]; *Venkatasami* v. *Viranna* (1922) 45 Mad. 429, 65 I.C. 964, ('22) A.M. 135. See also *Jugal* v. *Anunda* (1896) 22 Cal. 545 [suit for specific performance against minor—see s. 441]; *Manasharam Das* v. *Ahmad* (1916) 21 C. W. N. 63, 37 I. C. 380, ('17) A.C. 235.

(*u*) *Manilal Hurgovan, In re* (1901) 25 Bom 353; *Jagannath Ramji, In re* (1895) 19 Bom. 96; *Jairam Laxman, In re* (1892) 16 Bom. 634. See remarks of Kania, J., in *In re Dattatraya Govind Haldankar* (1932) 56 Bom. 519, 141 I. C. 697, ('32) A.B. 537 explaining 25 Bom 353.

(*v*) *Hari Narain Das, In re* (1923) 50 Cal. 141, 74 I.C. 244, ('23) A.C. 409, *In re Bijay Kumarsingh Buller* (1932) 59 Cal. 570, 138 I.C. 739, ('32) A.C. 502.

(*w*) *Govind Prasad, In the matter of* (1928) 50 All. 709, 112 I.C. 873, ('28) A.A. 709.

Illustrations.

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(a) *A*, and his minor son *B*, are members of a joint family governed by the Mitakshara law. The only property which the family possesses is a house which is in a very bad state of repair. Besides, there are family debts which have to be paid, but the family has no means either to effect the repairs or to pay the debts. *C* offers to buy the house at Rs. 40,000, provided *A* obtains the sanction of the High Court for the sale on behalf of his minor son *B*. *A* cannot apply for the sanction unless he gets himself appointed guardian of *B*'s property. *A* thereupon applies to the Court that he may be appointed guardian of *B*'s property, and that the sale be sanctioned by the Court. It is proved to the satisfaction of the Court that, if the sanction be not given, the property is not likely to realize a sum approaching Rs. 40,000. This is a fit case for the appointment of *A* as guardian and for sanctioning the sale: *Manilal Hargowan, in re* (1901) 25 Bom. 353.

(b) The facts are the same as in ill. (a) with this difference that *A* does not propose to sell the property, but to raise a loan on a mortgage of the property. It is proved to the satisfaction of the Court that if the mortgage is sanctioned by the Court, better terms can be obtained from the mortgagee than without the sanction. The High Court may appoint *A* guardian of *B*'s property, and sanction the mortgage: *Jairam Laxmon, in re* (1892) 16 Bom. 634.

IV. GUARDIAN DE FACTO AND GUARDIAN AD HOC.

538. Alienations by guardian de facto and guardian ad hoc. (*1*) A de facto guardian is one who manages the minor's estate, such person being neither a natural guardian nor a guardian appointed by the Court.

(*2*) A de facto guardian has the same power of alienating the property of his ward as a natural guardian (*x*). A *bona fide* mortgage executed by the de facto guardian of a Hindu minor for the benefit of his estate and with due regard to his interests cannot be impeached on the sole ground that he is merely a de facto guardian (*y*), for example, if it is effected for the marriage of the minor's sister (*z*). The High Courts of Bombay (*a*) and Madras (*b*) have held that a sale by a step-mother, though she was in each case the de facto manager of the minor's estate, is a sale by an unauthorized person, and is therefore void. The question as to the validity of a mortgage by a step-mother arose before the Judicial Committee in *Bunseedhur* v. *Bindeseree* (*c*), where it was held that the

(*x*) *Hunooman Persaud* v. *Mussumat Babooee* (1856) 6 M. I. A. 393, 412-413; *Seetharamanna* v. *Appiah* (1926) 49 Mad. 768, 92 I. C. 827, ('26) A.M. 457 [sale by maternal uncle upheld]; *Mohanund* v. *Nafar* (1899) 26 Cal. 820 [sale by paternal grandmother upheld]; *Bai Amrit* v. *Bai Manik* (1875) 12 Bom. H. C. 79, 81; *Lalla* v. *Koonwur* (1886) 10 M. I. A. 454 [mortgage by step-mother held not binding on the ground that it was fraudulent]; *Nathuram* v. *Shoma* (1890) 14 Bom. 562 [mortgage by father's cousin upheld].

(*y*) *Kundan Lal* v. *Beni Prasad* (1932) 13 Lah. 399, 137 I. C. 115, ('32) A. L. 293.

(*z*) *Sheo Govind* v. *Ram Adhin* (1933) 8 Luck. 182, 140 I. C. 556, ('33) A. O. 31.

(*a*) *Lambaji* v. *Rahi* (1923) 49 Bom. 576, 88 I.C. 643, ('25) A. B. 499 [transferee entitled to benefit of s. 51 of the Transfer of Property Act, 1882].

(*b*) *Narayanan* v. *Raiunni* (1924) 47 Mad. L. J. 686, 84 I. C. 973, ('25) A.M. 260, commented upon in *Seetharamanna* v. *Appiah* (1926) 49 Mad. 768, at pp. 773-774, 92 I. C. 827, ('26) A. M. 457.

(*c*) (1866) 10 M. I. A. 454.

transaction being fraudulent, the minor was not bound by it. But the power of a step-mother to alienate the minor's property as a de facto guardian was not questioned. The Bombay decision has since been overruled by the Full Bench decision of the same Court (*d*). It is submitted that the earlier Madras decision is wrong. **Ss. 538, 539**

(*3*) An alienation by a de facto guardian, which is neither for necessity nor for the benefit of the estate of the minor, is not void, but only voidable, and it may therefore be ratified on the minor attaining majority (*e*).

(*4*) A sale by a guardian ad hoc, *e.g.*, by a separated uncle who has never intermeddled or acted as a guardian, is void (*f*).

538A. The paternal grand-mother is not a natural guardian of a Hindu minor.—As a de facto guardian she cannot create any obligation on the minor's estate, by executing a promissory note in renewal of a promissory note executed by the minor's father (*g*).

538B. De facto guardian of lunatic.—The de facto manager of the estate of a lunatic has no power to alienate his property for necessity (*h*).

V.—REMEDIES.

539. Procedure for recovering custody of minors.—A guardian, who has been deprived of the custody of his ward, has the following remedies open to him :

(1) He may proceed by suit against the person alleged to be in wrongful possession of the ward.

In *Besant* v. *Narayaniah* (*i*), where a suit was brought by a Hindu father in the District Court of Chinglepat for the custody of his minor sons, their Lordships of the Privy Council said : "A suit *inter partes* is not the form of procedure prescribed by the Act [that is the Guardians and Wards Act, 1890] for proceedings in a *District Court* touching the guardianship of infants.". Following this decision it has been held by the Madras High

(*d*) *Tulsidas* v. *Vaghela Raisinghji* (1933) 57 Bom. 40, 141 I.C. 17, ('33) A.B. 15.

(*e*) *Seetharāmanna* v. *Appiah* (1926) 49 Mad. 768, 92 I.C. 827, ('26) A.M. 457.

(*f*) *Harilal* v. *Gordhan* (1927) 51 Bom. 1040, 105 I.C. 722, ('27) A.B. 611 [transferee entitled to benefit of s. 51 of the Transfer of Property Act, 1882].

(*g*) *Nagindas Gokuldas* v. *Bhimrao Damu* (1943) Bom. 117, 205 I.C. 44, ('43) A.B. 44.

(*h*) *Kanhayalal* v. *Harsingh* (1944) Nag. 698.

(*i*) (1914) 41 I.A. 314, 322, 38 Mad. 807, 820, 24 I.C. 290, ('14) A.PC. 41.

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Court that the proper procedure in proceedings in a Mufassal Court touching the custody of a minor is by way of petition under sec. 25 of the Act, and not by way of suit (*j*). On the other hand, it was held by the High Court of Bombay (*k*), that the dictum of the Privy Council in *Besant*'s case was not intended to be of such general application as to take away the right of suit in all cases, that the provisions of the Guardians and Wards Act, 1890, were not exhaustive, and that a suit for the custody of a minor lies even in a Mufassal Court. The Chief Court of the Punjab (*l*) and the Allahabad High Court (*m*), have held that a petition is the only form of procedure allowed in matters relating to the custody of minors.

(2) He may proceed by a writ of *habeas corpus*, in cases where the ward is within the limits of the ordinary original civil jurisdiction of the High Court of Bengal, Madras or Bombay and has been unlawfully restrained [the Code of Criminal Procedure, 1898, s. 491].

For the case where a minor is confined under such circumstances that the confinement amounts to an offence, see sec. 100 of the Code of Criminal Procedure, 1898. For the case where a female minor has been detained for an unlawful purpose, see s. 552 of that Code.

(*j*) *Sathi* v. *Ramandi* (1919) 42 Mad. 647, 53 I.C. 399, ('20) A.M. 93 [F.B.], see also *Ibrahim* v. *Ibrahim* (1916) 39 Mad. 608, 33 I.C. 894, ('17) A.M. 612.

(*k*) *Achratlal* v. *Chimanlal* (1916) 40 Bom. 600, 37 I.C. 215, ('16) A.B. 129, following *Sharifa* v. *Munekhan* (1901) 25 Bom. 574.

(*l*) *Ghasita* v. *Wazira* (1896) Punj. Rec. No. 41 [F.B.].

(*m*) *Sham Lal* v. *Bhindo* (1904) 26 All. 594; *Utma Kuar* v. *Bhagwanta Kuar* (1915) 37 All. 515, 29 I.C. 416, ('15) A.A. 199.

CHAPTER XXV.

MAINTENANCE.

"The aged parents, a virtuous wife, and an infant child must be maintained, even by doing a hundred misdeeds."—*Manu* cited in the Mitakshara.

CONTENTS.

I.—NATURE AND EXTENT OF RIGHT OF MAINTENANCE.

540. Priority of debts over maintenance.—Debts contracted by a Hindu take precedence over the right to maintenance (*n*) [s. 570]. Ss. 540-542

541. Liability for maintenance of two kinds.—The liability of a Hindu to maintain others arises in some cases from the mere relationship between the parties, independently of the possession of any property [s. 542]. In other cases, it depends altogether on the possession of property (*o*) [ss. 543-544].

542. Personal liability: liability of father, husband and son.—A Hindu is under a legal obligation to maintain his wife, his minor sons, his unmarried daughters, and his aged parents whether he possesses any property or not. The obligation to maintain these relations is personal in character, and arises from the very existence of the relation between the parties (*p*).

Thus, the only persons who are under a *personal* obligation to maintain others are—

(1) the father, who is bound to maintain his minor sons and unmarried daughters;

(2) the husband who is bound to maintain his wife; and

(3) the son who is bound to maintain his aged parents.

It is clear from what has been stated above that a Hindu is not under a *personal* obligation to maintain his grandchildren. Nor is he under any such obligation to maintain his sister, his step-mother, his daughter-in-law, or his sister-in-law, though the obligation to maintain them may arise from possession of property, as will appear from the two following sections.

(*n*) *Adhiranee* v. *Shona Malee* (1876) 1 Cal. 365; *Lakshman* v. *Satyabhamabai* (1878) 2 Bom. 494, 505.

(*o*) *Savitribai* v. *Luxmibai* (1878) 2 Bom. 573 at p. 597, *et seq.* [F.B.]

(*p*) (1878) 2 Bom. 573, 597-598 [F.B.], *supra*.

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543. Liability dependent on possession of coparcenary property: liability of manager.—(*1*) The manager of a joint Mitakshara family is under a legal obligation to maintain all male members of the family, their wives and their children (*q*). On the death of any one of the male members, he is bound to maintain his widow and his children (*r*) s. [559]. The obligation to maintain these persons arises from the fact that the manager is in possession of the family property.

(*2*) The same principles apply to cases governed by the Dayabhaga law. But in applying these principles, it is to be remembered that there can be no coparcenary according to that law between a father and sons [s. 277]; and, further, that on the death of a coparcener without leaving male issue, his widow succeeds to his share in the coparcenary property as his heir [s. 281]. According to the Mitakshara law, she is entitled to maintenance only (*s*).

According to both the schools, a father is under a *personal* obligation to maintain his minor sons. But where the father has ancestral property in his hands, then if the case is governed by the Mitakshara law, sons, even if adult, are entitled to maintenance out of the ancestral property [s. 545], but not if the case is governed by the Dayabhaga law, for under that law sons do not acquire by birth any interest in ancestral property [s. 273].

As to impartible property, see s. 589.

544. Liability dependent on possession of inherited property: liability of heirs.—An heir is legally bound to provide, out of the estate which descends to him, maintenance for those persons whom the late proprietor was legally or morally bound to maintain. The reason is that the estate is inherited subject to the obligation to provide for such maintenance (*t*).

Illustrations.

(a) *Sister.*—A Hindu is under no *personal* obligation to maintain his sister, but if he inherits his father's estate, he is bound to maintain her *out of that estate*, she being a person whom his father was legally bound to maintain as his daughter, provided, of course, that she is unmarried [s. 542].

(b) *Step-mother.*—A step-son is under no personal obligation to maintain his step-mother; but if he inherits his father's estate, he is bound to maintain her out of the estate, she being a person whom his father was legally bound to maintain as his wife: *Bai Daya* v. *Natha* (1885) 9 Bom. 279; *Narbadabai* v. *Mahadev* (1881) 5 Bom. 99.

(c) *Mother-in-law.*—*A* dies leaving a widow *B* and a mother *C*. *B* is under no personal obligation to maintain her mother-in-law *C*; but if she inherits property from

(*q*) Manu, chap. 9, sec. 108; Narada, chap 13, secs. 26, 27, 28, 33; *Vaikuntam* v. *Kallapiram* (1900) 23 Mad. 512, 516; *Cheruttu* alias *Vasu* v. *Nangamparambil Ramu* alias *Kuttamay* (1940) Mad. 830, ('40) A.M. 661.

(*r*) *Bhagwan Singh* v. *Mst. Kewal Kaur* (1927) 8 Lah. 360, 101 I.C. 201, ('27) A.L. 28.

(*s*) *Manjappa* v. *Lakshmi* (1891) 15 Bom. 234; *Rango* v. *Yamunabai* (1879) 3 Bom. 44-49.

(*t*) *Khetramani* v. *Kashinath* (1869) 2 Beng. L.R. A.C. 15, 34, 38 [F.B.]; *Kamini* v. *Chandra* (1890) 17 Cal. 373, 376 378.

A, she is bound to maintain *C*, she [*C*] being a person whom *A* was legally bound to maintain as his mother: *Bai Kanku* v. *Bai Jadav* (1884) 8 Bom. 15.

(d) *Daughter-in-law.*—*A* dies leaving a window *W* and a father *F*. He leaves no property. Is *F* under any obligation to maintain his destitute daughter-in-law *W*? Yes, but the obligation is only a *moral* one, so that he may refuse to maintain her. Suppose now that *F* dies leaving a widow *B*. On *F*'s death, *B* inherits his estate as his heir. *B* now comes under a *legal* obligation to maintain *W* out of the estate, she being a person whom the late proprietor (*F*) was *morally* bound to maintain (*u*). See sec. 564 below.

544A. Liability of the Crown.— The obligation to maintain extends even to the Crown when the Crown takes the estate by escheat or by forfeiture (*v*).

II.—PERSONS ENTITLED TO MAINTENANCE.

545. Sons. (*1*) A father is under a personal obligation to maintain his *minor* sons; therefore, he is bound to maintain them even out of his separate or self-acquired property. But he is under no such obligation to his *adult* sons; therefore, he is not bound to maintain them out of property which belongs exclusively to him (*w*).

If the father and sons are members of a joint family governed by the Mitakshara law, and there is joint family property, the sons, even if adult, are entitled to maintenance out of the joint property. The reason is that under the Mitakshara law, sons take a vested interest in joint family property by birth (*x*). The liability to maintain an adult son is not limited to the income of what would have been his share on a partition of the joint family property (*y*).

But the sons do not, in cases governed by the Dayabhaga law, acquire any interest by birth in ancestral property [sec. 273, 274]. A father, therefore, under the Bengal school, is not bound to maintain his *adult* sons either out of his separate or out of ancestral property.

(*2*) A son who is entitled to sue for partition can sue for maintenance (*z*). Where he cannot sue for partition, without the

(*u*) *Janki* v. *Nandram* (1889) 11 All. 194, *Rajanikanta Pal* v. *Sajanisundaree Dasee* (1934) 61 Cal. 221, 61 I A. 29, 147 I C 438, ('34) A.PC. 29; *Rangammal* v *Echhammal* (1899) 22 Mad. 305.

(*v*) *Mst. Golab Koonwar* v. *Collector of Benares* (1847) 4 M.I.A. 246.

(*w*) *Ammakannu* v. *Appu* (1888) 11 Mad. 91, *Premchand* v. *Hulashchand* (1869) 4 Beng. L R. App. 23, *Ramchandra* v. *Sakaram* (1878) 3 Bom. 346, 350, 351, *Bhoorath Nath Chakrabarti* v. *Basanta Kumaree Debee* (1936) 63 Cal. 1098, ('36) A C. 556.

(*x*) See *Savitribai* v. *Laximibai* (1878) 2 Bom. 573, 597 [F B]; *Sartaj Kuari* v. *Deoraj Kuari* (1888) 10 All. 272, 288, 15 I A. 51.

(*y*) *Chanavirgauda* v. *District Magistrate of Dharwar* (1927) 51 Bom. 120, 100 I C 575, ('27) A.B. 91 [lunatic son claim for maintenance of lunatic while in asylum —claim upheld though in excess of lunatic's share of income].

(*z*) *Cherutty alias Vasu* v. *Nangamparambil Ramu alias Kuttaman* (1940) Mad. 830, ('40) A M 664.

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consent of certain coparceners, as in Bombay (*a*), he is entitled to maintenance out of the joint family property (*b*).

546. Daughters.—A father is bound to maintain his unmarried daughters. On the death of the father, they are entitled to be maintained out of his estate (*c*).

A daughter on marriage ceases to be a member of her father's family, and becomes a member of her husband's family (*d*). Thenceforth she is entitled to be maintained by her husband, and, after his death, out of his estate [sec. 559]. If the husband has left no estate, her father-in-law, if he has got separate property of his own, is morally, though not legally, bound to maintain her; but, after his death, she acquires a legal right to be maintained out of his estate on the principle stated in section 544 above. If she is unable to obtain maintenance from her husband, or, after his death, from his family, her father, if he has got separate property of his own, is under a moral, though not a legal, obligation to maintain her. But it is not settled whether, after the father's death, she acquires a legal right to be maintained by his heirs out of his estate. The High Court of Bombay has held that she acquires no such right (*e*). On the other hand, the opinion has been expressed by the High Court of Calcutta, that she does acquire such right, provided she is unable to obtain maintenance from her husband's family (*f*). Recently the Madras High Court has held that a widowed daughter who is without means and whose husband's family is unable to support her is entitled to be maintained by her step-mother out of her father's estate (*g*).

See notes to sec. 544 above.

547. Grandchildren.—A grandfather is under no personal obligation to maintain his grandsons or granddaughters (*h*).

548. Parents. A son is under a personal obligation to maintain his aged father. He is also under a similar obligation to maintain his aged mother, and he is bound to maintain her, whether or not he has inherited property from his father (*i*).

(*a*) *Apaji* v. *Ramchandra* (1892) 16 Bom. 29.
(*b*) *Bhupal* v. *Tavanappa* (1922) 46 Bom. 435, 64 I.C. 568, ('22) A.B. 292.
(*c*) *Bai Mangal* v. *Bai Rukhmini* (1899) 23 Bom 291; *Tulsha* v. *Gopal Rai* (1884) 6 All. 632
(*d*) *Kartic Chunder* v. *Saroda Sundari* (1891) 18 Cal. 642, 646.
(*e*) *Bai Mangal* v. *Bai Rukhmini* (1899) 23 Bom. 291.
(*f*) *Mokhada* v. *Nundo Lall* (1901) 28 Cal. 278, 288.
(*g*) *Ambubai Ammal* v. *Sani Bai Ammal* (1941) Mad. 13, ('40) A.M. 804.
(*h*) *Manmohini* v. *Balak Chandra* (1871) 8 Beng. L.R. 22; *Kalu* v. *Kashibai* (1883) 7 Bom. 127.
(*i*) *Subbarayana* v. *Subbakka* (1885) 8 Mad. 236

Step-mother.—See s. 544, ill. (b).

549. Famale members of a joint Hindu family.—As to maintenance of female members of a joint Hindu family, see sec. 543 above.

550. Disqualified heirs.—Where a son or other heir is excluded from inheritance by reason of disability [s. 98], he is entitled to maintenance for himself and his family out of the property which he would have inherited but for the disability [s. 110].

551. Illegitimate sons.—The illegitimate sons of a Hindu may be divided into four classes, namely :—

(1) Illegitimate sons of a Hindu belonging to one of the three higher classes by a *dasi*, that is, a Hindu concubine in the continuous and exclusive keeping of their putative father.

As to the meaning of the word "dasi" see sec. 43, nos. 1-3, note no. (4) on page 36 above.

(2) Illegitimate sons of a Sudra by a *dasi*.

(3) Illegitimate sons of a Hindu by a Hindu woman who is not a *dasi*.

(4) Illegitimate sons of a Hindu by a non-Hindu woman.

(1) The illegitimate son of a Hindu belonging to one of the three higher classes by a *dasi* is entitled only to maintenance, and not to any share of the inheritance (Mit. ch. I, s. 12, v. 3). The right of maintenance attaches in the first instance to the separate property of the father (*j*). Where the father has left no such property, it attaches to property of the joint family of which the father was a member (*k*). Such a son is entitled to maintenance for life (*l*).

(2) The illegitimate son of a Sudra by a *dasi* is entitled to a share after his father's death in the separate property of his father (Mit. ch. I, s. 12, v. 2). Where the father has left no separate property, but was joint with his collaterals at his death, the illegitimate son is not entitled to demand a partition of the joint family property in their hands, but he is

(*j*) *Roshan Singh* v. *Balwant Singh* (1900) 22 All. 191, 27 I. A. 51; *Chuoturya* v. *Purhulad* (1857) 7 M.I.A. 18.

(*k*) *Ananthaya* v. *Vishnu* (1893) 17 Mad. 160; *Hiralal Laxmandas* v. *Meghraj Bhikchand* (1938) Bom. 779.

(*l*) *Nilmoney Singh* v. *Baneshur* (1879) 4 Cal. 91.

S. 551 entitled as a member of the family to maintenance out of that property. His position in this respect is analogous to that of widows and disqualified heirs to whom the law allows maintenance because of their exclusion from inheritance and from a share on partition, and the Court may, as in their case, award not only future but also past maintenance so far as it is not barred by the law of limitation, and may direct the same to be secured by a charge on the joint family property. Such maintenance is payable to the illegitimate son for life (*m*).

(3) The illegitimate son of a Hindu by a Hindu woman who is not a *dasi* is entitled to maintenance even if he be the result of a casual (*n*) or adulterous (*o*) intercourse. During his father's lifetime, he is entitled to maintenance against him (*p*). After the father's death he is entitled to maintenance out of the separate property of the father. Where the father has left no such property, he is entitled to maintenance out of the estate of the joint family of which the father was a member (*q*). But the right of the illegitimate son to maintenance is personal to him; it does not descend on his death to his offspring. Thus, if *A* dies leaving an illegitimate son *B*, and *B* dies leaving a son *C*, *C* is not entitled to maintenance out of *A*'s property (*r*).

According to the Dayabhaga school, the right of such a son to maintenance ceases on his attaining majority (*s*); according to the Mitakshara school, it extends up to his death (*t*).

(4) The illegitimate son of a Hindu by a non-Hindu woman is not entitled to maintenance under the Hindu law, but he may claim maintenance from his putative father under sec. 488 of the Code of Criminal Procedure, 1898. The right under that section, however, cannot be enforced against the estate of the father after the father's death; it can only be enforced during the lifetime of the father (*u*).

(*m*) *Vellaiyappa Chetty* v. *Natarajan* (1931) 55 Mad. 1, 58 I.A. 402, 134 I.C. 1084, ('31) A.PC. 294 affmg. *Vellaiyappa* v *Natarajan* (1927) 50 Mad. 340, 100 I.C. 655, ('27) A.M. 386.

(*n*) *Muttuswamy Jagavera* v. *Vencataswara* (1868) 12 M.I.A. 203, 220.

(*o*) *Rahi* v. *Govind* (1875) 1 Bom. 97; *Viraramuthi* v *Singaravelu* (1877) 1 Mad. 306; *Subramania* v. *Valu* (1911) 34 Mad. 68, 5 I. C. 919.

(*p*) *Ghana* v. *Gereli* (1905) 32 Cal. 479; *Kuppa* v. *Singaravelu* (1885) 8 Mad. 325

(*q*) (1911) 34 Mad. 68, 5 I.C. 919, *supra*, (1857) 7 M.I.A. 18, *supra*; (1868) 12 M.I.A. 203, *supra*, (where there was a remand); *Raja Parichat* v. *Zalim Singh* (1878) 3 Cal. 214, 4 I.A. 159; *Hargobind* v. *Dharam Singh* (1884) 6 All 329.

(*r*) *Roshan Singh* v. *Balwant Singh* (1900) 22 All. 191, 27 I.A. 51.

(*s*) *Nilmoney Singh* v. *Baneshur* (1879) 4 Cal. 91.

(*t*) *Hargobind* v. *Dharam Singh* (1884) 6 All. 329; *Kuppa* v. *Singaravelu* (1885) 8 Mad. 325.

(*u*) *Lingappa* v. *Esudasan* (1904) 27 Mad. 13 (Christian woman); *Sitaram* v. *Ganpat* (1923) 25 Bom. L.R. 420, 73 I.C. 412, ('23) A.B. 384 (Mahomedan woman).

(5) In a Madras case it was observed that the illegitimate son of a Sudra by a *dasi*, who was not entitled to inherit, should be allowed only a compassionate rate of maintenance (*v*). In a later Madras case it was said that this view was not correct and that regard should be had in every case to the income of the estate left by the putative father and to the mode of life to which the son was accustomed in the lifetime of the father (*w*). Ss. 551-553

The illegitimate son of a Hindu who is the result of an adulterous intercourse is in no case entitled to maintenance higher than the amount of the income which he would have got out of his share had he been a dasiputra (*x*).

552. Illegitimate daughters.—There is no provision in Hindu law for the maintenance of illegitimate daughters (*y*); but they are entitled to claim maintenance from their putative father under sec. 488 of the Code of Criminal Procedure, 1898.

This view is put on the ground that the expression "*dasiputra*" occurring in texts bearing on the subject applies only to an illegitimate *son* (*putra*), and not to an illegitimate *daughter*.

553. Concubine—Avaruddhastri.—A Hindu is not entitled to transfer joint family property to an Avaruddhastri for her maintenance (*z*) nor is he bound to maintain her. He can discard her at any moment, and she cannot compel him to keep her or to provide for her maintenance (*a*). But if she was in his exclusive keeping *until his death*, his estate, in the hands of those who take it, is liable after his death for her maintenance (*b*). It is not a condition precedent to her right to maintenance that she should have resided in the same house as the deceased together with his wife and his family (*c*). But her right to maintenance is conditional upon her continued chastity (*d*).

Avaruddhastri.—In a Bombay case the High Court held that to constitute a concubine an *avaruddha stree* she must be a concubine with whom the connection of the deceased paramour was open and recognized and who was kept by him in his house practically as a member of the family. But this view was rejected by the Judicial

(*v*) *Gopalasami* v. *Arunachelam* (1904) 27 Mad. 32.

(*w*) *Rathinasabapathi* v. *Gopala* (1929) 56 Mad. L.J. 673, 121 I.C. 126, ('29) A.M. 545.

(*x*) *Chamava* v. *Iraya* (1931) 33 Bom. L.R. 1082, 1088, 134 I.C. 1153, ('31) A.B. 492.

(*y*) *Parvati* v. *Ganpatrao* (1894) 18 Bom. 177, 183; *Vellaiyappa* v. *Natarajan* (1927) 50 Mad. 340, 100 I.C. 655, ('27) A.M. 386.

(*z*) *Thakur Rab Prasad Singh* v. *Chootay Munwar* (1937) 12 Luck. 469, 164 I.C. 1000, ('37) A. O. 29.

(*a*) *Ramanarasu* v. *Buchamma* (1900) 23 Mad. 282.

(*b*) *Ningareddi* v. *Lakshmawa* (1902) 26 Bom. 163; *Vrandavandas* v. *Yamunabai* (1875) 12 Bom. H.C.A.C. 229; *Rama Raja* v. *Papammal* (1925) 48 Mad. 805, 90 I.C. 983, ('25) A.M. 230.

(*c*) *Bai Nagubai* v. *Bai Monghibai* (1926) 53 I.A. 153, 50 Bom. 604, 96 I.C. 20, ('26) A.PC. 73, reversing (1923) 47 Bom. 401, 69 I.C. 291, ('23) A.B. 130.

(*d*) *Yashvantrav* v. *Kashibai* (1888) 12 Bom. 26.

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Committee on appeal, and it was held that residence in the same house with her paramour together with his wife and regular family was not now necessary, whatever may have been the case when a concubine was a slave of the household (*e*).

Kept mistress whose husband is alive.—It has been held by the Bombay High Court that a married woman who left her husband and lived with another as his permanently kept mistress may be regarded as Avaruddha Stri if she remains faithful to him and she is entitled to maintenance from his estate so long as she preserves her sexual fidelity to him (*f*).

Amount of maintenance.—In determining the amount of maintenance to be awarded to an *avaruddhastri* the Court should have regard to her age, her past mode of life, and the extent of the estate of the deceased paramour (*g*).

MAINTENANCE OF WIFE.

553A. Statutory right of maintenance.—The wife's right to separate maintenance and residence is now regulated by the Hindu Married Women's Right to Separate Residence and Maintenance Act, 1946 (see Appendix XIII). In the following section the law has been stated under the decided cases.

554. Wife's right of maintenance.—(*1*) A wife is entitled to be maintained by her husband, whether he possesses property or not (*h*). When a man with his eyes open marries a girl accustomed to a certain style of living, he undertakes the obligation of maintaining her in that style (*i*). The maintenance of a wife by her husband is a matter of personal obligation arising from the very existence of the relation, and quite independent of the possession by the husband of any property, ancestral or self-acquired (*j*). The maintenance being a matter of personal obligation, she has no claim for maintenance against her husband's property in the hands of a transferee from him. Nor has she any claim against the crown, if his property has been attached under secs. 87 and 88 of the Criminal Procedure Code, 1898, as the property of an absconder (*k*).

Her remedy is to obtain a decree of a Civil Court creating a formal charge on the property (*l*).

(*2*) A wife is not entitled, during her husband's life-time, to be maintained either by her relations or by her husband's relations, even if she has been deserted by him, unless they have in their possession property belonging to her husband (*m*).

555. Separate residence and maintenance.—(*1*) A wife's first duty to her husband is to submit herself obediently to his authority, and *to remain under his roof and protection* (*n*). She is not, therefore, entitled to separate residence or mainten-

(*e*) *Bai Nagubai* v. *Bai Monghibai*, *supra*. The decision in *Musammat Haidri* v. *Narindra* (1926) 1 Luck. 184, 98 I.C. 677, ('26) A. O. 294, is no longer good law.

(*f*) *Akku Pralhad* v. *Ganesh Pralhad* (1945) Bom. 216.

(*g*) (1875) 12 Bom. H.C.A.C. 229, *supra*.

(*h*) *Narbadabai* v. *Mahadeo* (1881) 5 Bom. 99, 103.

(*i*) *Prem Pratap Singh* v. *Jagar Pratap Kunwari* (1944) All. 118.

(*j*) *Jayanti* v. *Alamelu* (1904) 27 Mad. 45, 48.

(*k*) *Chatru* v. *The Crown* (1929) 10 Lah. 265, 111 I.C. 435, ('28) A.L. 681.

(*l*) *Secretary of State for India* v. *Ahalyabai Narayan* (1938) Bom. 454, 40 Bom. L. R. 422, 176 I.C. 453, ('38) A. B. 321.

(*m*) *Ramabai* v. *Trimbak* (1872) 9 Bom. H.C. 283.

(*n*) *Sitanath* v. *Haimabutty* (1875) 24 W.R. 377, 379.

ance, unless she proves that, by reason of his misconduct or by his refusal to maintain her in his own place of residence or for other justifying cause, she is compelled to live apart from him (*o*). Neither unkindness not amounting to cruelty (*p*), nor the fact that the husband has taken a second wife (*q*), nor ordinary quarrels between husband and wife (*r*), justify the wife in leaving her husband's house. But she would be justified in leaving his house, and would be entitled to separate maintenance from him, if he kept a concubine in the house (*s*), or habitually treated her with such cruelty as to endanger her personal safety (*t*). She is not bound to prove repeated violence ; nor is delay in bringing the suit a ground for refusing the relief (*u*). S. 555

Where a husband who was on cordial terms with his wife made a gift of his property to his wife the ostensible purpose being her maintenance, it was held that the wife was not a creditor and that the gift in her favour could not prevail against the rights of the creditors (*v*).

(2) A wife living apart from her husband for no improper purpose may at any time return and claim to be maintained by him. Her right is not forfeited, but is only suspended so long as she commits a breach of duty by living apart from him (*w*) ; so, where she subsequently comes back and offers to live with him, his refusal to take her back entitles her to demand maintenance. The suspension ceases when the husband dies. He cannot under the provisions of the Succession Act execute a Will to defeat such a right (*x*). The amount of maintenance to which she would be entitled depends on various circumstances, such as the past relations between the parties, their social standards and the husband's property (*y*). Where the wife lived with her father who was in affluent circumstances and did not claim maintenance from her husband for a long time and the husband had no property, arrears prior to the date of demand were refused (*z*).

Where a husband turned his wife out of doors because he suspected her chastity and the wife obtained an order against him for maintenance under sec. 488 of the Code of

(*o*) *Sidlingapa* v. *Sidava* (1878) 2 Bom. 634 ; *Nitye* v. *Soondaree* (1868) 9 W.R. 475 [refusal to maintain] ; *Sitabai* v. *Ramchandrarao* (1910) 12 Bom. L.R. 373, 6 I.C. 525 [abandonment of wife] ; *Shinappaya* v. *Rajamma* (1922) 45 Mad. 812, 69 I.C. 25 ('22) A.M. 399 [husband's leprosy]. *Appibai* v. *Khimji Cooverji* (1936) 60 Bom. 455, 38 Bom. L. R. 77, 162 I. C. 188, ('36) A.C. 138.

(*p*) (1875) 24 W.R. 377, *supra*.

(*q*) *Virasvami* v. *Appasvami* (1863) 1 Mad. H. C. 375.

(*r*) *Rajlukhy* v. *Bhootnath* (1900) 4 C. W. N. 488.

(*s*) *Gobind* v. *Dowlut* (1870) 14 W.R. 451 ; *Dulur Koeri* v. *Dwarkanath* (1905) 32 Cal. 234, 239.

(*t*) *Matangini* v. *Jogendra* (1892) 19 Cal. 84.

(*u*) *Ude Singh* v. *Mst. Daulat Kaur* (1935) 16 Lah. 892, 158 I.C. 223., ('35) A. L. 386.

(*v*) *Brij Raj Kuar* v. *Ram Dayal* (1932) 7 Luck. 411, 135 I.C. 369, ('32) A.O. 40.

(*w*) *Surampalli* v. *Surampalli* (1908) 31 Mad. 338.

(*x*) *Periambal* v. *Sunderamal* (1945) Mad. 586.

(*y*) *Appibai* v. *Khimji Cooverji* (1936) 60 Bom. 455, 38 Bom. L. R. 77, 162 I. C. 188, ('36) A. B. 138.

(*z*) *Sobhanadramma* v. *Narasimhaswami* (1934) 57 Mad. 1003, 150 I.C. 797, ('34) A.M. 401.

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Criminal Procedure, 1898, and when she proceeded to execute the order, he filed a suit for restitution of conjugal rights, it was held that it was a proper case for refusing the husband a decree (*a*).

556. Unchastity of wife.—A wife, who leaves her home for purposes of adultery, and persists in following a vicious course of life, forfeits her right to maintenance (*b*), even though it is secured by a decree (*c*). But it would seem that if she completely renounces her immoral course of conduct, her husband is liable to furnish her with a "bare" (or what is also called "starving") maintenance, that is, food and raiment just sufficient to support her life (*d*).

Starving maintenance.—In *Parami* v. *Mahadevi* (*e*), Chandavarkar, J., after examining the original texts bearing on the subject, observed as follows :—

"The general rule to be gathered from these is that a Hindu wife cannot be absolutely abandoned by her husband. If she is living an unchaste life, he is bound to keep her in the house under restraint and provide her with food and raiment just sufficient to support life; she is not entitled to any other right. If, however, she repents, returns to purity and performs expiatory rites, she becomes entitled to all conjugal and social rights unless her adultery was with a man of a lower caste, in which case, after expiation, she can claim no more than bare maintenance and residence."

See secs. 96 and 561.

557. Change of religion by husband.—(*1*) A wife is entitled to maintenance, though her husband may abandon Hinduism (*f*).

(*2*) Where a marriage has been dissolved under the Native Converts' Marriage Dissolution Act, 1866, at the suit of a husband who has abandoned Hinduism, the Court may by its decree order the husband to make such allowance to his wife for her maintenance during the remainder of her life as the Court thinks just. An allowance so ordered ceases from the time of any subsequent marriage of the wife.

See the Native Converts' Marriage Dissolution Act, 1866, sec. 28. See also sec. 441 above.

558. Wife of disqualified heir.—Where the husband is excluded from inheritance on account of personal disability [s. 98], his wife is entitled to maintenance out of the property which he would have inherited but for the disability. But her right to maintenance is conditional upon her continued chastity (*g*).

(*a*) *Babu Ram* v. *Musammat Kokla* (1924) 46 All. 210, 79 I.C. 634, ('24) A.A. 391.

(*b*) *Hata* v. *Narayanan* (1863) 1 Mad. H. C. 372; *Debi Saran* v. *Daulata* (1917) 39 All. 234, 39 I.C. 10, (17) A.A. 86; *Kandasami* v. *Murugammal* (1896) 19 Mad. 6.

(*c*) (1896) 19 Mad. 6, *supra*.

(*d*) See *Parami* v. *Mahadevi* (1910) 34 Bom. 278, 5 I.C. 960, and the case cited in the preceding foot-note.

(*e*) (1910) 34 Bom. 278, 283, 5 I.C. 960.

(*f*) *Mansha* v. *Jiwan* (1884) 6 All. 617.

(*g*) *Yashvantrav* v. *Kashibai* (1888) 12 Bom. 26, 28, Mitakshara, chap. ii, sec. 10, paras. 14, 15, Dayabhaga, chap. v, para. 19.

MAINTENANCE OF WIDOW.

559. Widow's right of maintenance.—(*1*) A widow, who does not succeed to the estate of her husband as his heir, is entitled to maintenance— **S. 559**

(i) out of her husband's separate property (*h*); also

(ii) out of property in which he was a coparcener at the time of his death (*i*).

(*2*) A widow does not lose her right of maintenance out of the estate of her husband even though she may have lived apart from him in his lifetime without any justifying cause and was living separate from him at the time of his death (*j*).

Illustrations.

(a) A Hindu governed by the Mitakshara law dies leaving a widow and male issue. He leaves self-acquired property. The male issue will inherit the property subject to the obligation to maintain the widow out of that property.

(b) *A* and his father *F* are members of a joint family governed by the Mitakshara law. *A* dies leaving a widow and *F*. On *A*'s death, his undivided interest in the coparcenary property lapses so as to *enlarge* the interest of *F* in the property. *A*'s widow is entitled to be maintained by her father-in-law *F* out of the coparcenary property *quoad* the interest of *A* in the property. If *F* refuses to maintain her, she may sue him to have her maintenance charged on a portion of the joint property, such portion not exceeding one-half of the property, that being her husband's share in the property: *Jayanti* v. *Alamelu* (1904) 27 Mad. 45.

(c) *A* and his brother *B* are members of a joint family governed by the Dayabhaga law. *A* dies leaving him surviving a widow *W*, a son *S*, and a brother *B*. *S* will succeed to *A*'s separate property as well as his undivided interest in the coparcenary property (s. 78), subject to the obligation to maintain *W* out of the property. If *A* dies without leaving male issue, *W* will succeed to the whole of his property, joint as well as separate, in which case she will take a widow's estate in *A*'s separate property, and will be a coparcener with *B* as to the joint property with the right of demanding a partition of such property against *B* [s. 348].

Nature and extent of widow's right of maintenance.—The only person who is under a legal obligation to maintain out of *his own* property the widow of a deceased Hindu is her own son [s. 548]. As regards others, her only right to maintenance is *out of her husband's estate.* That estate may be in the hands of his male issue as in ills. (a) and (c) or it may be in the hands of his coparceners as in ill. (b). But whether it is in the hands of the one or the other, he is liable to maintain her, not because he is under a personal obligation to maintain her, but because he has in his hands her husband's estate. The property is liable for her maintenance and a charge may be created on it even if the property is attached and held by Government on the ground that the present holder has absconded (*k*). At the same time it is to be remembered that her maintenance is not *ipso facto* a charge upon her husband's estate [s. 569]. The estate may be sold for her husband's debts, or, where it is the joint property of the family for debts binding on the family [s. 570]. Even if it is sold without any justifying necessity, she cannot follow it in the hands of a *bona fide* purchaser for value, unless she has acquired a previous charge on the estate for her maintenance (*l*) [ss. 569-570].

(*h*) *Brinda* v. *Radhica* (1885) 11 Cal. 492, 494; *Narabadabai* v. *Mahadeo* (1881) 5 Bom. 99, 106; *Bhagabati* v. *Kanailal* (1871) 8 Beng. L. R. 225.

(*i*) *Devi Persad* v. *Gunwanti* (1895) 22 Cal. 410; *Jayanti* v. *Alamelu* (1904) 27 Mad. 45; *Becha* v. *Mothina* (1901) 23 All. 86; *Adhibai* v. *Cursandas* (1887) 11 Bom. 199; *Shridar Bhagwanji Teli* v. *Mst. Sitabai* (1938) Nag. 289, ('38) A. N. 198.

(*j*) *Surampalli* v. *Surampalli* (1908) 31. Mad. 388.

(*k*) *Secretary of State for India* v. *Ahalyabai Narayan* (1938) Bom. 454, 40 Bom. L. R. 422, 176 I. C. 453, ('38) A. B. 321.

(*l*) *Kuloda Prosad* v. *Jageshar* (1900) 27 Cal. 194; *Somasundaram* v. *Unnamalai* (1920) 43 Mad. 800, 59 I.C. 398, ('20) A.M. 722.

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Widow's rights against joint family property.—*A* and *B* are two brothers joint in food, worship and estate. *A* dies leaving a widow *W*. *W* has private property of her own out of which she is able to maintain herself. Is *W* entitled to maintenance out of the income of the joint property which passed into the hands of *B* by survivorship on *A*'s death ? No according to the Calcutta High Court (*m*). Yes, according to the Madras High Court, subject to this that her private means should be taken into account in determining the quantum of maintenance to be decreed to her (*n*). According to the Madras High Court, the right of the widow of a coparcener in a Hindu family to maintenance is an absolute right due to her membership in the family and does not depend on any necessity arising from her want of other means to support herself; she is therefore entitled to some maintenance out of her husband's estate.

Where a widow suing her husband's coparceners for maintenance has, at the time the suit is brought, sufficient joint family funds to provide her with maintenance for several years, the Court should refuse to decree maintenance to her, leaving her to file a fresh suit after that period (*o*). The same principle applies where she ought to have in her hands joint family funds which, however, are not available at the date of the suit they having been dissipated by her before suit (*p*). A widow inheriting some of her husband's share of the joint family property under Hindu Women's Rights of Property Act is still entitled to maintenance with reference to the other properties, but, in fixing the maintenance the property inherited by her may be taken into consideration (*q*).

A prior decree obtained by her against her husband during his life-time for maintenance is no bar to her claiming a right of maintenance and right of residence against the heirs (*r*).

Where a widow sues for maintenance after partition among the coparceners of the joint family she is entitled to a decree only against those members who are in possession of her husband's share, such as her son (natural or adopted) and his sons and grandson (*s*).

Where a widow gets maintenance from the surviving members of the joint family to which her husband belonged, she is not assessable to income-tax even though there is a single surviving coparcener (*t*): *Commissioner of Income-tax* v. *Laxminarayan* (1935) 59 Bom. 618, 37 Bom. L. R. 692, 159 I. C. 424, ('35) A.B. 412. Where in a joint family consisting of females only the amount payable as maintenance to a widow is increased by an agreement the amount continues to be exempt from paymant of income-tax (*u*).

560. Widow residing apart.—(*1*) A wife cannot leave her husband's house when she chooses and require him to provide maintenance for her elsewhere. But the case of a widow is different. A widow is *not bound* to reside with her husband's family, and she does not forfeit her right to maintenance out of her husband's estate by going to reside elsewhere, *e.g.*, in her parent's house (*v*). All that is required of her is that she must not leave her husband's house for improper or unchaste purposes, and she is entitled to separate maintenance unless she is guilty of unchastity or other improper practices after

(*m*) *Ramawati* v. *Manjhari* (1906) 4 Cal. L.J. 74.

(*n*) *Lingayya* v. *Kanakamma* (1915) 38 Mad. 153, 28 I.C. 200, ('16) A.M. 444.

(*o*) *Dattatraya* v. *Rukhmabai* (1909) 33 Bom. 50, 1 I.C. 466.

(*p*) *Srinivasa* v. *Ammani* (1931) 61 Mad. L.J. 381, 134 I. C. 981, ('31) A. M. 668.

(*q*) *Sarojini Devi* v. *Subrahmanyam* (1945) Mad. 61.

(*r*) *Mt. Sham Devi* v. *Mohan Lal* (1934) 15 Lah. 591, 152 I.C. 606, ('34) A.L. 167.

(*s*) *Narasimham* v. *Venkatasubamma* (1932) 55 Mad. 752, 137 I.C. 749, ('32) A.M. 351; *Laxmibai Ganapatrao* v. *Radhabhai Krishnaji* (1945) Bom. 604.

(*t*) *Vedathanni* v. *The Commissioner of Income Tax* (1933) 56 Mad. 1, 140 I.C. 17, ('32) A.M. 733.

(*u*) *Commissioner of Income Tax U. P. & C. P.* v. *Sarwan Kumar* (1945) All. 509.

(*v*) *Dattatraya Maruti* v. *Laxman Julippa* (1942) Bom. 584, 203 I.C. 139, ('42) A.B. 260.

she leaves that residence (*w*). Where the property is so small as not to admit of an allotment to her of a separate maintenance, the Court may, in the exercise of its discretion, refuse separate maintenance to her (*x*). **Ss. 560, 560A**

(3) Where the husband by his will makes it a condition that his wife should reside in the family house with his relatives, she is not entitled to separate maintenance if she resides elsewhere without just cause (*y*). Strained relations between herself and her husband's adopted son on account of former litigation between them may be a just cause (*y1*).

560A. Arrears of maintenance.—A widow who has left the residence of her deceased husband, not for unchaste purposes, is entitled not only to maintenance, but also to arrears of maintenance from the date of her leaving her husband's residence, though she does not prove that she has incurred debts in maintaining herself and gives no reasons for the change of residence (*z*).

It is erroneous in law to fix the *date of the widow's suit* as the starting point of maintenance. The proper date is the *date on which she left her husband's residence.* If after the husband's death the widow has remained in his house and has accepted maintenance in fact and in kind, she is not entitled to arrears from the *date of her husband's death* except perhaps in an extreme case where she is kept under circumstances of extreme penury and oppression. Such a case, however, must be treated as most exceptional and would require unimpeachable proof. The Judicial Committee is extremely reluctant to interfere with the amount of a decree for maintenance unless there has been some miscarriage in the way the amount has been arrived at (*a*). Courts have got large discretion in awarding arrears (*b*) and may take into consideration the fact that a sudden demand for a large sum by way of arrears would be inequitable and embarrassing (*c*). In this case the High Court awarded arrears for 25 months against 12 years claim. The Court may for sufficient reasons refuse to award any arrears, or it may award arrears at a rate lower than that fixed for her future maintenance (*d*). Arrears at an enhanced rate should be allowed only from the date of the suit for enhancement (*e*).

Where a widow was entitled under an agreement to maintenance at a certain rate to be paid on a particular date in each year and she dies some time before the time fixed for payment, her heir is entitled to recover the proportionate amount of maintenance due after the last payment till her death, for the right accrues from day to day (*f*).

(*w*) *Raja Pirthee Singh* v. *Rajkooer* (1873) 12 Beng. L.R. 238, 247 I.A. Sup. Vol. 203; *Narayanrao* v. *Ramabai* (1879) 3 Bom. 415, 421, 6 I.A. 114, 119; *Ekradeshwari* v. *Homeshwar* (1929) 56 I.A. 182, 8 Pat. 840, 116 I.C. 409, ('29) A.PC. 128; *Kasturbai* v. *Shivajiram* (1879) 3 Bom. 372; *Gokibai* v. *Lakhmidas* (1890) 14 Bom. 490; *Siddessuri* v. *Janardan* (1902) 29 Cal. 557.

(*x*) *Godavaribai* v. *Sagunabai* (1898) 22 Bom. 52; (1879) 3 Bom. 372, *supra*; *Ramchandra* v. *Sagunabai* (1880) 4 Bom. 261.

(*y*) *Mulji* v. *Bai Ujam* (1889) 13 Bom. 218; *Girianna* v. *Honama* (1891) 15 Bom. 236; *Tincouri* v. *Krishna* (1893) 20 Cal. 15, (1929) 56 I.A. 182, 8 Pat. 840, 116 I.C. 409, ('29) A.PC. 128, *supra*.

(*y1*) *Jamuna Kuwar* v. *Arjun Singh* (1940) All. 739, 143 I.C. 27, ('41) A.A. 43.

(*z*) (1929) 56 I.A. 182, 8 Pat. 840, 116 I. C. 409, ('29) A.PC. 128, *supra*.

(*a*) *Ekradeshwari* v. *Homeshwar* (1929) 56 I. A. 182, 8 Pat. 840, 116 I.C. 409, ('29) A.PC. 128.

(*b*) *Gurshiddappa* v. *Parwatewwa* (1937) Bom. 113, 38 Bom. L. R. 1293, 167 I. C. 973, ('37) A. B. 135.

(*c*) *Dattatraya Maruthi* v. *Laxman Jutippa* (1942) Bom. 584, 203 I.C. 139, ('42) A.B. 260.

(*d*) *Rathubans* v. *Bhagvant* (1899) 21 All. 18; *Narbasappa* v. *Kallava* (1919) 43 Bom. 66, 47 I. C. 623, ('18) A. B. 122; *Shridhar Bhagwanji Teli* v. *Mst. Sitabai* (1938) Nag. 289, ('38) A. N. 198; *Gurushiddappa* v. *Parwatewwa* (1937) Bom. 113, 38 Bom. L. R. 1293, 167 I.C. 973, ('37) A.B. 135.

(*e*) *Veerayya* v. *Chellamma* (1939) Mad. 234.

(*f*) *Rangappayya* v. *Shiva* (1934) 57 Mad. 280, 145 I.C. 961, ('33) A.M. 699.

S. 561

561. Unchastity of widow.—(*1*) The right of a widow to maintenance is conditional upon her leading a life of chastity. If she becomes unchaste the burden ot proving which is on the opposite party (*g*) the right is forfeited (*h*), even if it has been secured by a decree (*i*) or by agreement (*j*). But if she returns to a moral life, she is entitled to "bare" or what is also called "starving" maintenance, that is, to food and raiment just sufficient to support her life (*k*) [ss. 96 and 556].

(*2*) A charge of unchastity as disentitling a widow to maintenance must be specifically raised in the pleadings (*l*).

Provision for maintenance under an agreement.—It often happens that a dispute arises between the widow and her husband's relations as to the *amount* of maintenance, and the amount is fixed amicably by an agreement between the parties. In such a case, if the husband's relations fail to pay the amount fixed by the agreement, and she sues them for maintenance under the agreement, she is not entitled to maintenance of any sort if subsequent unchastity is proved (*m*). But if the unchastity does not continue up to the date of the suit, and she has reformed her ways before the suit and reverted to a chaste life, she is entitled to bare maintenance (*n*). These cases must be distinguished from the case where the widow claims her husband's property as being his self-acquired property, and the dispute is settled by an agreement between the parties whereby her husband's relations agree to pay her a fixed sum of money monthly or annually in consideration of her releasing her claim to the property. In such a case, if the relations fail to pay the agreed amount, and the widow sues them for arrears due to her under the agreement, she is entitled to a decree for the full amount notwithstanding her subsequent unchastity (*o*).

Provision for maintenance under a will.—Where maintenance is given by a will, it is not forfeited by unchastity unless it is expressly provided that it should be so forfeited (*p*).

Provision for maintenance under a decree.—A decree obtained by a Hindu widow declaring her right to maintenance is liable to be set aside or suspended in its operation on proof of subsequent unchastity given by her husband's relatives either in a suit brought by them expressly for the purpose of setting aside the decree, or in answer to the widow's

(*g*) *Lakshmichand* v. *Anandi* (1935) 62 I.A. 250, 59 All. 672, 37 Bom. L. R. 849, 157 I.C. 819, ('35) A.PC. 180.

(*h*) *Pirthee Singh* v. *Raj Kooer* (1873) 12 Beng. L.R. 238, 247 I.A. Sup. Vol. 203; *Moniram* v. *Keri Kolitani* (1880) 5 Cal. 776, 783, 6 I.A. 115; *Valu* v. *Ganga* (1883) 7 Bom. 84; *Romanath* v. *Rajonimoni* (1890) 17 Cal. 674; *Vishnu* v. *Manjamma* (1885) 9 Bom. 108.

(*i*) (1885) 9 Bom. 108, *supra*; *Daulta Kuari* v. *Meghu* (1893) 15 All. 382; *Ranmalsangji* v. *Kundan* (1902) 26 Bom. 707.

(*j*) *Nagamma* v. *Virabhadra* (1894) 17 Mad. 392.

(*k*) *Honamma* v. *Timannabhat* (1877) 1 Bom. 559; *Sathyabhama* v. *Kesavacharya* (1916) 39 Mad. 658, 29 I.C. 397, ('16) A.M. 464; *Bhikubai* v. *Hariba* (1925) 49 Bom. 459, 94 I.C. 665, ('25) A.B. 153; *Ram Kumar Dube* v. *Bhagwanta* (1934) 56 All. 392, 148 I.C. 625, ('34) A.A. 78 where Rs. 15 per month were allowed, the estate paying a land revenue of Rs. 3,500.

(*l*) *Haji Saboo Sidick* v. *Ayeshabai* (1903) 27 Bom. 485, 30 I.A. 127.

(*m*) *Nagamma* v. *Virabadhra* (1894) 17 Mad. 392; *Kisanji* v. *Lukshmi* (193) 33 Bom. L.R. 510, 135 I.C. 477, ('3) A.B. 286. See also *Shirlal* v. *Bai Sankli* (1931) 33 Bom. L.R. 490, 132 I.C. 444, ('31) A.B. 297.

(*n*) (1916) 39 Mad. 658, 29 I.C. 397, ('16) A. M. 464, *supra*; (1925) 49 Bom. 459, 94 I.C. 665, ('25) A. B. 153, *supra*.

(*o*) *Bhupshingh* v. *Lachman* (1904) 26 All. 321, 325.

(*p*) *Parami* v. *Mahaderi* (1910) 24 Bom. 278 5 I.C. 960.

suit to enforce her right (*q*). If the decree is suspended in its operation, and she returns to a life of chastity, the Court may award her bare maintenance (*r*).

562. Right of widow to reside in family house.—A Hindu widow is, in the absence of any special circumstances, entitled to reside in the family dwelling house in which she lived with her husband [see sec. 573 below].

A Hindu who died in 1888 provided by his will that his elder wife should "have the right of residence for the term of her natural life in the three-storied portion of" a specified house. Her son resided with her in that portion of the house continuously from his father's death. Upon a partition in 1898 that portion of the house was allotted to the son subject to his mother's right of residence. In 1899 the right, title and interest of the son was sold in execution, but the purchaser did not attempt to take possession for over twelve years. The son claimed that the right of the purchaser was barred by adverse possession. It was held by the Judicial Committee that upon the true construction of the will the widow had an exclusive right of residence, not merely a Hindu widow's right of residence and that the son's possession was merely by her licence, and not adverse to the purchaser (*s*).

563. Widow remarrying.—A widow by remarriage forfeits her right of maintenance out of the estate of her first husband [the Hindu Widows' Remarriage Act, 1856, sec. 2]. The High Court of Allahabad has held that a widow who is allowed to remarry according to the *custom* of her caste does not by remarriage forfeit her right to maintenance out of the estate of her first husband (*t*), and this view has been followed by the Chief Court of Oudh (*u*). The other High Courts have held that she does (*v*). The Allahabad High Court has again considered the matter in a Full Bench and has held that she does not, unless it is proved that the custom also involves such forfeiture on such a contingency (*w*).

The whole point is whether the provisions of the Hindu Widows' Remarriage Act, 1856, apply to the case of a remarriage where such remarriage is allowed by the *custom* of the caste. If they do, a widow by remarriage forfeits all interest in her husband's property whether it be (1) by inheritance to her husband, or (2) by way of maintenance out of his property. If they do not, she does not forfeit either of those rights. The Allahabad High Court holds the latter view. The other High Courts hold the former view, and they have accordingly decided that a widow on remarriage forfeits her interest in the estate *inherited* by her from her first husband, even though the remarriage is

(*q*) *Vishnu* v. *Manjmma* (1885) 9 Bom. 108; *Daulta Kuari* v. *Meghu* (1893) 15 All. 382, *supra*.

(*r*) *Honamma* v. *Timannabhat* (1877) 1 Bom. 559, as explained in *Bhikhu Bai* v. *Hariba* (1925) 49 Bom. 459, *supra*.

(*s*) *Annada Prashad* v. *Ambica Prashad* (1926) 53 I.A. 201, 53 Cal. 918, 97 I.C. 761, ('26) A.PC. 96.

(*t*) *Gajadhar* v. *Kaunsilla* (1909) 31 All. 161; *Mulla* v. *Partab* (1910) 32 All. 489. 6 I.C. 116; *Mangat* v. *Bharto* (1927) 49 All. 203, 100 I.C. 734, ('27) A.A. 523.

(*u*) *Ram Lal* v. *Musammat Jwala* (1928) 3 Luck. 610, 109 I.C. 791, ('28) A.O. 338, *Gajadhar* v. *Musammat Sukhdei* (1930) 5 Luck. 689, 121 I.C. 899, ('31) A.O. 107.

(*v*) *Vithu* v. *Govinda* (1898) 22 Bom. 321 [F.B.]; *Rasul* v. *Ram Surun* (1895) 22 Cal. 589; *Murugayi* v. *Viramakali* (1877) 1 Mad. 226; *Suraj* v. *Attar* (1922) 1 Pat. 706, 67 I.C. 550, ('22) A.P. 378; *Santala* v. *Badaswari* (1923) 50 Cal. 727, 75 I.C. 11, ('24) A.C. 98.

(*w*) *Bola Uman* v. *Kausilla* (1933) 55 All. 24, 140 I. C. 631, ('32) A.A. 617.

Ss. 563, 564

allowed by the custom of the caste. No case has arisen in those Courts as to the right of such a widow to *maintenance* out of the property of her first husband; but it is clear that if such a case did arise, the right would be negatived. See notes to sec. 43, under the head "Widow."

564. Widowed daughter-in-law.—(*1*) Where there is no property left by the husband, or where the property in which he was a coparcener at the time of his death is not sufficient for the maintenance of the widow, the question arises whether she has a *legal* claim for maintenance either against her own relations or against her husband's relations. It has been held that she has no such claim either against her father or against his estate in the hands of his heirs [s. 546]. Nor has she any claim to maintenance against her husband's relations (*x*).

Even her father-in-law is not under a legal obligation to maintain her (*y*). But if he has got separate property of his own, he is under a *moral* obligation to maintain her out of such property. On the death, however, of the father-in-law, his son, widow, or other heir inheriting his property, comes under a legal obligation to carry out this moral obligation, and to maintain her out of such property. In other words, on the death of the father-in-law, the moral obligation on him to maintain his daughter-in-law ripens into a legal obligation on his *heirs* inheriting his estate in accordance with the principle stated in section 544 above (*z*). But this is subject, according to the Bombay High Court, to the condition that her husband was living at the time of his death in union with his father (*a*).

In a case in which the father-in-law had disposed of his property by will, it was held by the High Court of Bombay, that the daughter-in-law was not entitled to maintenance out of the property in the hands of the devisee (*b*). This decision has been followed by the Madras High Court (*c*) but recently the Calcutta High Court has held the other way (*d*).

(*x*) *Gangabai* v. *Sitaram* (1876) 1 All. 170; *Savitribai* v. *Laxmibai* (1878) 2 Bom. 573 [husband's paternal uncle]; *Apaji* v. *Gangabai* (1878) 2 Bom. 632 [husband's brother]; *Bai Daya* v. *Natha* (1885) 9 Bom. 279 [step-son].

(*y*) *Kalu* v. *Kashibai* (1883) 7 Bom. 127; *Meenakshi* v. *Rama Aiyar* (1914) 37 Mad. 396, 18 I.C. 34, ('14) A.M. 587.

(*z*) *Janki* v. *Nandram* (1889) 11 All. 194 [F.B.]; *Siddessury* v. *Janardan* (1902) 29 Cal. 557; *Kamini* v. *Chandra* (1890) 17 Cal. 373; *Yamunabai* v. *Manubai* (1899) 23 Bom. 608; *Adhibai* v. *Cursandas* (1887) 11 Bom. 199, 207; *Ammakannu* v. *Appu* (1888) 11 Mad. 91; *Jai Nand* v. *Musammat Paran* (1929) 4 Luck. 491, 118 I.C. 419, ('29) A.O. 251 [F.B.]; *Rangammal* v. *Echhammal* (1899) 22 Mad. 305.

(*a*) *Yamunabai* v. *Manubai* (1899) 23 Bom. 608.

(*b*) *Bai Parvati* v. *Tarwadi* (1901) 25 Bom. 263.

(*c*) *Sankaramurthy* v. *Subbamma* (1939) Mad. 242.

(*d*) *Phool Coomari Dasi* v. *Debondra Nath Seal* (1942) 1 Cal. 202, 202 I.C. 30, ('42) A.C. 474.

(2) The daughter-in-law does not lose her right of maintenance out of the estate of her father-in-law by declining to reside in her father-in-law's house (*e*). **Ss. 564-566**

Illustration.

A dies leaving a widow *B*, but without leaving any property. *B* has no legal claim for maintenance against her father-in-law. But if the father-in-law dies leaving separate property, *B* is entitled to maintenance out of such property from his heirs who may be *B*'s brother-in-law, or her mother-in-law or sister in-law. According to the Bombay decisions *B* is not entitled to maintenance out of the estate of her father-in-law unless her husband (*A*) was living in union with his father at the time of his death (*f*).

565. Loss of caste.—Excommunication from caste does not deprive a Hindu wife of her right of maintenance (*g*).

III.—AMOUNT OF MAINTENANCE.

566. Amount of maintenance payable to a widow.—(*1*) The maintenance to be awarded to a widow should be such an amount as will enable her to live consistently with her position as a widow, with the same degree of comfort and reasonable luxury as she had in her husband's house (*h*), unless there are circumstances which affect, one way or the other, her mode of living there. In other words, in determining the amount of maintenance the Court should have regard to the following circumstances (*i*) :—

(1) the value of the estate, taking the debts for which it is liable also into consideration (*j*) ;

(2) the position and status of the deceased husband and of the widow ;

(3) the reasonable wants of the widow including not only the ordinary expenses of living, but what she might reasonably expend for religious and other duties incident to her station in life (*k*).

(4) The past relations between her and her husband (*l*).

(*e*) *Siddessury* v. *Janardan* (1902) 29 Cal. 557.

(*f*) *Yamunabai* v. *Manubai* (1899) 23 Bom. 608.

(*g*) *Queen* v. *Marimuttu* (1882) 4 Mad. 243. See Act 21 of 1850.

(*h*) *Rajanikanta Pal* v. *Sajanisundaree Dasee* (1934) 61 Cal. 221, 61 I.A. 29, 147 I.C. 438, ('34) A.PC. 29.

(*i*) *Ekradeshwari* v. *Homeshwar* (1929) 56 I.A. 182, 8 Pat. 840, 116 I.C. 409, ('29) A.PC. 128.

(*j*) *Shridhar Bhagwanji Teli* v. *Mst. Sitabai* (1938) Nag. 289, ('38) A. N. 198.

(*k*) *Nitto Kissoree* v. *Jogendro Nauth* (1878) 5 I.A. 55 ; *Baisni* v. *Rup Singh* (1890) 12 All. 558; *Devi Persad* v. *Gunwanti* (1895) 22 Cal. 410; *Dalel Kunwar* v. *Ambika* (1903) 25 All. 266; *Sundarji* v. *Dahibai* (1905) 29 Bom. 316; *Lala Maheshwari Prasad* v. *Mst. Sahdei Kunwar* (1938) Luck. 13, 165 I. C. 227, ('37) A. O. 16.

(*l*) *Purushothamdas Harjivandas* v. *Bai Rukmani* (1938) Bom. 1, 39 Bom. L. R. 458, 170 I.C. 897, ('37) A. B. 358.

S. 566 (2) In calculating the amount of maintenance, the widow's *stridhana* must be taken into account unless it is of an unproductive character, such as clothes and jewels (*m*). But if the ornaments are of great value and are likely to be converted into money, that fact may be considered (*n*). But a voluntary payment by a brother to which she has no claim and which may be stopped at any moment ought not to be taken into account (*o*), nor her earnings by her own personal exertions (*p*). There is a conflict of opinion whether a widow is entitled to maintenance out of the property of the joint family to which her husband belonged, when the income from her *stridhana* is sufficient for her maintenance [see notes to s. 559].

(3) The widow of a deceased coparcener is not entitled to maintenance in excess of the annual income of the share to which her husband would have been entitled on partition, if living (*q*). Where the estate is heavily indebted even one-fifth or one-sixth of the husband's income may be an adequate maintenance (*r*).

(4) A widow, who has once received a sufficient allotment for her maintenance, but has dissipated it, is not entitled to further maintenance (*s*).

Wants and exigencies.—" By the common law the right to maintenance is one accruing from time to time according to the wants and exigencies of the widow " (*t*).

Value of the estate.— " The amount of the property, doubtless, is *an element* in determining the sufficiency of maintenance, but it cannot be regarded as the criterion " (*u*).

Conduct of widow.—The conduct of the claimant to maintenance may also be taken into consideration (*v*).

Funeral expenses of the widow.—The funeral expenses of a widow are payable out of the estate of her husband. Her *stridhana* cannot be charged with such expenses (*w*).

(*m*) *Shib Dayee* v. *Doorga Pershad* (1872) 4 N.W.P. 63; *Savitribai* v. *Laxmibai* (1878) 2 Bom. 573, 584; *Gokibai* v. *Lakhmidas* (1890) 14 Bom. 490.

(*n*) *Gurushiddappa* v. *Parwatawwa* (1937) Bom. 113, 38 Bom. L. R. 1293, 167 I.C. 973, ('37) A. B. 135.

(*o*) *Bahima Saraswathi Kuer* v. *Bahuria Sheoratan Kuer* (1933) 12 Pat. 869, 149 I.C. 738, ('34) A. P. 09.

(*p*) *Jai Ram* v. *Mst. Shiv Devi* (1938) Lah. 352, ('38) A. L. 344; *Bai Jaya* v. *Ganpatram Kalidas* (1941) Bom. 483, 196 I.C. 607, ('41) A.B. 305, 43 Bom. L. R. 618.

(*q*) *Madhavrav* v. *Gangabai* (1878) 2 Bom. 639; *Adhibai* v. *Cursandas* (1887) 11 Bom. 199, 209; *Jayanti* v. *Alamelu* (1904) 27 Mad. 45, 48.

(*r*) *Srimati Sabitri Thakurain* v. *Mrs. F. A. Savi* (1933) 12 Pat. 359, 145 I.C. 1, ('33) A.P. 306.

(*s*) *Savitribai* v. *Laxmibai* (1878) 2 Bom. 573, 583.

(*t*) *Narayanrao* v. *Ramabai* (1879) 3 Bom. 415, 6 I.A. 114, 118; *Rangubai* v. *Subaji* (1912) 36 Bom. 383, 14 I.C. 821.

(*u*) *Tagore* v. *Tagore* (1872) 9 Beng. L.R. 377, 413 I.A. Sup. Vol. 47, 82.

(*v*) *Tagore* v. *Tagore* (1872) 9 Beng. L. R. 377, 413 I.A. Sup. Vol. 47, 82; *Surampalli* v. *Surampalli* (1908) 31 Mad. 338, 341.

(*w*) *Ratanchand* v. *Javerchand* (1898) 22 Bom. 818.

Maintenance of wife forsaken by her husband.—Where a husband forsakes his wife without any justifying cause, she is entitled to one-third of the husband's property for her maintenance. It has been so held by the High Court of Bombay on the strength of a text of Yajnavalkya (*x*). **Ss. 566-568**

567. Amount of maintenance for other females.—The principles upon which maintenance is allowed to a widow are to be applied *mutatis mutandis* in determining the amount of maintenance to be awarded to other females; that is to say, the Court must have regard to the value of the property, and it must take into consideration the independent means of support, if any, of the person claiming the maintenance (*y*).

568. Amount may be increased or decreased.—The amount of maintenance, whether it is fixed by a decree or by agreement, is liable to be increased or diminished, whenever there is such a change of circumstances as would justify a change in the rate (*z*). Thus the rate of maintenance may be enhanced, if the income of the estate has materially increased or there has been a material increase in the cost of living (*a*) provided this was not anticipated and allowed for at the time of the decree (*b*). Similarly, the rate may be reduced, if the income of the estate has diminished (*c*), unless the diminution has been caused by the default or negligence of the person liable for maintenance (*d*). But the rate of maintenance need not vary with every fluctuation in the income (*e*). An agreement by a widow to receive a fixed maintenance per annum and *not to claim any increase in future* even in case of change of circumstances is binding upon her (*f*).

Procedure.—*A separate suit* must be brought to vary the rate of maintenance fixed by a decree, unless the decree contains a clause enabling the parties to apply for a modification of its terms, in which case an application may be made to alter the rate in *execution proceedings* (*g*).

It may be asked why it is that the rate of maintenance, though fixed by *agreement*, may be varied by the Court in a suit brought for that purpose. The answer is that the

(*x*) *Ramabai* v. *Trimbak* (1872) 9 Bom. H. C. 283, *Mayukha*, chap. 20, para 1.

(*y*) *Mahesh* v. *Durgpal* (1899) 21 All. 232, 234; *Tagore* v. *Tagore* (1872) 9 Beng. L.R. 377, 413 I.A. Sup. Vol. 47, 82.

(*z*) *Sidlingapa* v. *Sidava* (1878) 2 Bom. 624, 630; *Rajender* v. *Putto* (1879) 5 Cal. L. R. 18; *Thakur Seo Mangal Singh* v. *Thakurain Bodhi Kuar* (1930) 11 Luck. 607, 159 I.C. 356, ('36) A.O. 60.

(*a*) *Bangaru* v. *Vijayamachi* (1899) 22 Mad. 175.

(*b*) *Veerayya* v. *Shellamma* (1939) Mad. 234.

(*c*) *Trimbak* v. *Bhagu Bai* (1941) Nag. 437, 185 I.C. 580, ('39) A. N. 249.

(*d*) *Gopikabai* v. *Dattatraya* (1900) 24 Bom. 386; *Vijaya* v. *Sripathi* (1885) 8 Mad. 94; *Ruka Bai* v. *Ganda Bai* (1878) 1 All. 594.

(*e*) *Lala Maheswari Prasad* v. *Mst. Sahdei Kunwar* (1938) 13 Luck. 13, 165 I.C. 227, ('37) A. O. 16.

(*f*) *Moheshwara* v. *Durgamba* (1924) 47 Mad. 308, 78 I.C. 831, ('24) A. M. 687; *Purushottamdas Harjivandas* v. *Bai Rukmani* (1938) Bom. 1, 39 Bom. L. R. 458, 170 I.C. 897, ('37) A. B. 358.

(*g*) *Maharana Shri Ranmalsangji* v. *Kundan Kuwar* (1902) 26 Bom. 707 (1878) 1 All. 594.

Ss. 568, 569

right to maintenance does not rest on contract, but on the provisions of the Hindu law which expressly govern the rights and duties of the different members of a Hindu family (*h*).

IV.—TRANSFER OF FAMILY PROPERTY AND ITS EFFECT ON THE RIGHT OF MAINTENANCE.

569. **Maintenance not a charge.**—The claim, even of a widow, for maintenance is not a charge upon the estate of her deceased husband, whether joint or separate [s. 559], until it is fixed and charged upon the estate. This may be done by a decree of a Court, or by an agreement between the widow and the holder of the estate, or by the will by which the property was bequeathed. Therefore, the widow's right is liable to be defeated by a transfer of the husband's property to a *bona fide* purchaser for value without notice of the widow's claim for maintenance. It is also liable to be defeated by a transfer to a purchaser for value even with notice of the claim, unless the transfer was made *with the intention* of defeating the widow's right *and* the purchaser had *notice of such intention*. In fact, a widow's right to receive maintenance is one of an indefinite character which, unless made a charge upon the property, is enforceable only like any other liability in respect of which no charge exists (*i*). But where *maintenance has been made a charge upon the property*, and the property is subsequently sold, the purchaser must hold it subject to the charge (*j*). No question, however, of *bona fides* can arise where a transfer is made for payment of debts as stated in sec. 570.

Illustration.

A and his brother *B* are members of a joint Mitakshara family. *A* dies leaving a widow *C*. After *A*'s death, *B* sells the joint family property to *D*. It is proved that *B* sold the property with the intention of defeating *C*'s right of maintenance. It is also proved that *D* had notice of *C*'s claim for maintenance, but that he had no notice of the fact that *B* intended to defeat *C*'s right, and that he bought in the rational and honest belief that the sale was one which could be effected without any furtherance of wrong. The sale is valid against *C*, and *D* acquires a title free from *C*'s claim. But *C*'s claim will still subsist in full force as against *B*, the recipient of the purchase-money: *Lakshman* v. *Satyabhamabai* (1877) 2 Bom. 494, at p. 524.

(*h*) *Sidlingapa* v. *Sidava* (1878) 2 Bom. 624; *Lala Maheshwari Prasad* v. *Mst. Sahdei Kunwar* (1938) 13 Luck. 13, 165 I.C. 227, ('37) A.O. 16.

(*i*) *Lakshman* v. *Satyabhamabai* (1877) 2 Bom. 494; *Bharatpur State* v. *Gopal* (1902) 24 All. 160, 163; *Ram Kunwar* v. *Ram Dai* (1900) 22 All. 326; *Ramanadan* v. *Rangammal* (1889) 12 Mad. 260, 272, *Jayanti* v. *Alamelu* (1904) 27 Mad. 45, 49; *Soora Koer* v. *Nath Buksh* (1885) 11 Cal. 102 [mere notice immaterial]; *Prosonno* v. *Barbosa* (1866) 6 W. R. 253 [charge created by will]; *Sorolah* v. *Bhoobun* (1888) 15 Cal. 292, 307; *Sri Beharilalji* v. *Bai Rajbai* (1899) 23 Bom. 342; *Bhagat Ram* v. *Mst. Sahib Devi* (1922) 3 Lah. 55, 67, I.C. 848, ('22) A. L. 273 [transfer not *bona fide*].

(*j*) *Kuloda Prosad* v. *Jageshar* (1900) 27 Cal. 194; *Prosonno* v. *Barbosa* (1866) 6 W.R. 253.

The Transfer of Property Act, 1882, *sec.* 39.—A widow's right of maintenance not being a charge, it is but equitable that it should not be enforced against a *transferee for value* unless the transfer was made in fraud of the right of maintenance. A transferee for value may be a purcnaser, or he may be a mortgagee. The provisions of sec. 39 of the Transfer of Property Act, 1882, are to the same effect (*k*). That section is as follows :— **Ss. 569, 570**

" Where a third person has a right to receive maintenance or a provision for advancement o· marriage from the profits of immoveable property, and such property is transferred, the right may be enforced against the transferee if he has notice thereof or if the transfer is gratuitous ; but not against a transferee for consideration and without notice of the right, nor against such property in his hands."

Decree ; death of judgment debtor.—A decree for maintenance obtained against a member of an undivided family can be executed, after his death, against joint property in the hands of other members, if the decree created a *charge* against the joint family property (*l*) ; even when there is no charge, it may be executed against the son of the judgment debtor (*m*) to the extent of the ancestral property in his hands whether such maintenance was due at the time of the death of the deceased judgment debtor or became due since.

Where in execution of a decree creating a charge, the decree-holder herself purchases the charged property subject to her claim to future maintenance, it has been held that the judgment debtor's personal liability for future claims is not extinguished (*n*).

Possession of property by widow for her maintenance.—It has been held that where a widow is in possession of specific property for the purpose of her maintenance, a purchaser buying with notice of her claim is not entitled to possession of the property without first securing proper maintenance for her (*o*). It is the settled practice of the High Court of Bombay not to allow even an heir to recover family property from a widow in possession without first securing a proper maintenance for her (*p*). In such a case the property may be sold subject to her rights (*q*).

Charge may be created by a will.—*A* may bequeath his property to *B* subject to a charge for the maintenance of his widow out of the property (*r*).

Alienation made in husband's lifetime.—A Hindu widow is debarred from impeaching alienations of joint family property made *in her husband's lifetime.* The reason is that when her right of maintenance comes into existence (that is to say on her husband's death) she takes that right in the property as it stands at the time of her husband's death (*s*).

570. Transfer for payment of debts.—Debts contracted by a Hindu take precedence over the right of maintenance of his wife, or infant child (*t*), or his widow after his death (*u*). The same is true of debts contracted by the manager of the joint family of which the husband was a member, provided the

(*k*) See *Sri Beharilalji* v. *Bai Rajbai* (1899) 23 Bom. 342; *Ram Kunwar* v. *Ram Dai* (1900) 22 All. 326; *Somasundaram* v. *Unnamalai* (1920) 43 Mad. 800, 802, 59 I.C. 398, ('20) A M. 722.

(*l*) *Subbanna* v. *Subbanna* (1907) 30 Mad. 324; *Minakshi* v. *Chinnappa* (1901) 24 Mad. 689.

(*m*) *Mt. Munnibibi* v. *Radhay Shiam* (1945) Luck. 641; *Muttia* v. *Virammal* (1887) 10 Mad. 283; *Bhagirathi* v. *Anantha* (1894) 17 Mad. 268.

(*n*) *Sanyasirao* v. *Suryanarayanamma* (1937) Mad. 324, 165 I.C. 647, ('36) A.M. 964.

(*o*) *Rachawa* v *Shivayogapa* (1894) 18 Bom. 679; *Imam* v. *Balamma* (1889) 12 Mad. 334.

(*p*) *Yellawa* v. *Bhimangavda* (1894) 18 Bom. 452.

(*q*) *Ram Kumar* v. *Amar Nath* (1932) 54 All. 472, 138 I.C. 363, ('32) A.A. 361.

(*r*) *Prosonno* v. *Barbosa* (1866) 6 W.R. 253. See also (1899) 23 Bom. 342, *supra*.

(*s*) *Hamzan* v. *Ram Daiya* (1918) 40 All. 96, 42 I.C. 944, ('18) A.A. 408.

(*t*) *Sunder Singh* v. *Ram Nath* (1926) 7 Lah. 12, 93 I.C. 1013, ('26) A.L. 167; *Jawahir Singh* v. *Parduman Singh* (1933) 14 Lah. 399, 141 I.C. 424, ('33) A.L. 116.

(*u*) *Adhiranee* v. *Shona Malee* (1876) 1 Cal. 365; *Jayanti* v. *Alamelu* (1904) 27 Mad. 45; *Gur Dayal* v. *Kaunsila* (1883) 5 All. 367; *Natchiarammal* v. *Gopalkrishna* (1878) 2 Mad. 126; *Jamiat Rai* v. *Mt. Malai* (1932) 13 Lah. 41 133 I.C. 62, ('31) A. L. 718.

S. 570 debts were incurred for the benefit of the family (*v*). Similarly debts incurred by a joint family trading business take precedence over the widow's right to maintenance and residence (*w*). Therefore, if property belonging to the husband or to the joint family is sold in liquidation of such debts, the sale is binding on the widow, and she has no right of maintenance against the purchaser or against the property sold to him, even if the purchaser had notice of her claim for maintenance (*x*). But where maintenance has been made a charge upon the property, it takes precedence over the right of a subsequent purchaser of the same property in execution of a money-decree, though the decree was in respect of debts binding on the family (*y*). If the decree of a creditor against the members of a joint family based on a family debt is to be binding on a widow in the family entitled to maintenance, it is not necessary that she should be made a party to the suit so long as the family is joint. But if a partition is effected before the suit or during the pendency of the suit in which a separate share is allotted to her in lieu of her maintenance she ought to be made a party to such a suit (*z*).

Illustrations.

(a) *A* and his brother *B* are members of a joint Mitakshara family. *A* dies leaving a widow. After *A*'s death *B* sells the property in order to satisfy debts binding on the family. *B*'s widow has no claim for maintenance either against the purchaser or against the property: *Lakshman* v. *Satyabhamabai* (1877) 2 Bom. 494.

(b) *A* dies leaving a widow *B*. After *A*'s death, *C*, a creditor of *A*, obtains a decree against *B* as *A*'s legal representative, and sells the family house in execution of the decree. *B* has no claim for maintenance either against the purchaser or against the property: *Jayanti* v. *Alamelu* (1904) 27 Mad. 45.

(c) *A* and his sons *B*, *C* and *D*, are members of a joint family. *A* dies leaving a widow. After *A*'s death, *B*, as the manager of the family, sells the family house in order to pay debts binding on the family. *A*'s widow has no claim for maintenance either against the purchaser or against the property: *Ramanadan* v. *Rangammal* (1889) 12 Mad. 260.

(d) *A* sells certain property belonging to him for the payment of his debts. Neither *A*'s wife nor his children have any claim for maintenance against the purchaser or the property: *Gur Dayal* v. *Kaunsila* (1883) 5 All. 367.

(*v*) *Lakshman* v. *Satyabhamabai* (1877) 2 Bom. 494; *Ramanadan* v. *Rangammal* (1889) 12 Mad. 260; *Johurra* v. *Sreegopal* (1876) 1 Cal. 470.

(*w*) *Mt. Champa* v. *Official Receiver, Karachi* (1934) 15 Lah. 9, 144 I.C. 636, ('33) A.L. 901.

(*x*) (1877) 2 Bom. 494, *supra*; (1889) 12 Mad. 260, *supra*; *Musammat Tara* v. *Sarui* (1929) 10 Lah. 706, 149 I.C. 707, ('30) A.L. 117.

(*y*) *Somasundaram* v. *Unnamalai* (1920) 43 Mad. 800, 59 I.C. 398. The *dicta* to the contrary in *Sham Lal* v. *Banna* (1882) 4 All. 296, 300, and *Gur Dayal* v. *Kaunsila* (1883) 5 All. 367, are not supported by any text of Hindu law or by any decided case.

(*z*) *Mt. Prabhavati Kuer* v. *Ram Saran Lal* (1934) 13 Pat. 785, 152 I.C. 691, ('34) A.P. 538.

571. Right of maintenance against donees and devisees.—A Hindu cannot dispose of his entire property by gift or by will, so as to defeat the right of his widow to maintenance. If he does so, the donee or devisee must hold the property subject to the widow's right of maintenance, and the widow may enforce her right against it (*a*). Ss. 571-573

572. Transfer of property pending suit for maintenance.—If during the pendency of a suit instituted by a widow to establish a charge on specific immoveable property for her maintenance, the property is transferred by any other party to the suit, and a decree is subsequently passed creating a charge on the property for the widow's maintenance, the transferee must hold the property subject to such charge, unless the transfer be effected for the purpose of paying off a debt which has priority over the widow's claim for maintenance (*b*). The same rule applies where the widow is a party to the suit and she has by her written statement claimed a charge on the property (*c*).

The rule laid down in this section is an application of the doctrine of *lis pendens* as enunciated in the Transfer of Property Act, 1882, s 52. The rule does not apply where a widow claims maintenance without asking at the same time that it should be made a charge on the property (*d*).

V.—TRANSFER OF FAMILY DWELLING-HOUSE AND ITS EFFECT ON THE RIGHT OF RESIDENCE.

573. Widow of undivided coparcener.—Where an undivided family consists of two or more males related as father and son or otherwise, and one of them dies leaving a widow, she is entitled to reside in the family dwelling-house in which she lived with her husband (*e*). If the house is sold by the surviving coparcener or coparceners *without necessity*, the sale does not affect her right, and the purchaser cannot evict her (*f*), at all events until another suitable residence is found for her (*g*). If the purchaser buys the house with full knowledge that the widow is residing and is being maintained in it, the purchaser is not entitled to oust her even though there may be other property

(*a*) *Becha* v. *Mothina* (1901) 23 All. 86; *Joytara* v. *Ramhari* (1884) 10 Cal. 638; *Narbadabai* v. *Mahadeo* (1881) 5 Bom. 99, *Jamna* v. *Machul* (1879) 2 All. 315.

(*b*) *Dose Thimmanna* v. *Krishna* (1906) 29 Mad. 508.

(*c*) *Jogendra* v. *Fulkumari* (1900) 27 Cal. 77.

(*d*) *Manika* v. *Ellappa* (1896) 19 Mad. 271.

(*e*) *Bai Devkore* v. *Sanmukhram* (1889) 13 Bom. 101.

(*f*) *Venkatammal* v. *Andyappa* (1883) 6 Mad. 130; *Gauri* v. *Chandramani* (1876) 1 All. 262; *Talemand* v. *Rukmina* (1881) 3 All. 353.

(*g*) *Mangala* v. *Dinanath* (1869) 4 Beng. L R. O.C. 72.

Ss. 573, 574 belonging to the family out of which her maintenance can be derived (*h*). But if the sale is *for a family necessity*, she is liable to be evicted even though the purchaser had notice at the time of purchase that she was in occupation of the house (*i*). Similarly the right of residence cannot prevail against the husband's debts (*j*).

Illustrations.

(a) *A* dies leaving a widow and a son. The son sells the family dwelling-house without family necessity. The purchaser is not entitled to evict the widow: 4 Beng. L.R. O. C. 72; 6 Mad. 130; 7 Bom. 282.

(b) *A* and *B*, two Hindu brothers, are members of a joint family residing together in the family dwelling-house. *A* dies leaving a widow *W*. After *A*'s death dispute arise between *B*'s wife and *W*. *B* offers *W* a residence in another house on condition of *W* vacating the part of the family house in her occupation. *W* refuses and *B* sues *W* to recover from her possession of the portion of the family house in her occupation *B* is not entitled to possession. *W* is entitled to reside in the house: *Bai Devkore* v. *Sanmukhram* (1889) 13 Bom. 101.

(c) *A* and his nephew *B* are members of a joint family residing together in the family dwelling-house. *A* dies leaving a widow. After *A*'s death *B* sells the family dwelling-house without family necessity. The purchaser is not entitled to evict *A*'s widow: 1 All. 262.

The widow of a deceased coparcener cannot impeach an alienation of the family dwelling-house made in her husband's lifetime. Thus a daughter-in-law cannot impeach an alienation of the dwelling-house made by her father-in-law in her husband's lifetime (*k*).

574. Unmarried daughters of deceased coparcener.—Where an undivided family consists of two or more males related as father and son or otherwise, and one of them dies leaving unmarried daughters, they are entitled to reside, until their marriage, in the family dwelling-house in which they lived with their father, and a purchaser of the family house is not entitled to evict them unless the sale was for a family necessity (*l*).

Illustrations.

(a) *A* dies leaving a son, a widow *W*, and two unmarried daughters *D*1 and *D*2. On *A*'s death, the son enters into possession of the whole property including the family dwelling-house. The son then sells the house without family necessity. The purchaser is not entitled to oust the daughters. The daughters are entitled to reside in the house until their marriage.

(*h*) *Dalsukhram* v. *Lallubhai* (1883) 7 Bom. 282.

(*i*) *Ramanandan* v. *Rangammal* (1889) 12 Mad. 260. See also *Johurra* v. *Sreegopal* (1876) 1 Cal. 470, 475 [insolvency of manager]; *Mt. Champa* v. *Official Receiver, Karachi* (1934) 15 Lah. 9, 144 I.C. 636, ('33) A. L. 901.

(*j*) *Jamiat Rai* v. *Mt. Malan* (1932) 13 Lab. 41, 133 I.C. 62, ('31) A.L. 361.

(*k*) *Ramzan* v. *Ram Daiya* (1918) 40 All. 96, 42 I.C. 944, ('18) A.A. 408.

(*l*) *Suryanarayana* v. *Balasubramania* (1920) 43 Mad. 635, 56 I.C. 524, ('20) A.M. 160.

(b) In the case put in ill. (a), the son dies leaving his mother *W* and his two unmarried sisters *D*1 and *D*2. After his death the dwelling-house is sold in execution of a money-decree passed against *W* on a *personal* debt of *W*, and is purchased by *P*. *P* is not entitled to oust *D*1 and *D*2: *Suryanarayana* v. *Balasubramania* (1920) 43 Mad. 635, 56 I. C. 524, ('20) A.M. 106.

575. Wife and unmarried daughters of sole owner.— (*1*). Where a family consists only of a husband and wife the wife cannot assert her right of residence in the family dwelling-house either against the purchaser in execution of a decree passed against her husband in his lifetime or against his estate after his death (*m*), or even against a purchaser under a private sale from her husband without necessity (*n*), though the purchaser had notice at the time of sale that she was residing in the house (*o*).

(*2*) The same rule applies to unmarried daughters. They too cannot resist the claim for possession of the purchaser at a court-auction or under a private sale (*p*).

Illustrations.

(a) *N* executes a mortgage of the family dwelling-house to *M*. *M* obtains a decree on the mortgage against *N*. *N* then dies leaving a widow. After *N*'s death the house is sold in execution of the decree and purchased by *P*. *P* is entitled to the possession of the house free from the widow's right of residence: *Manilal* v. *Bai Tara* (1893) 17 Bom. 398; *Jayanti* v. *Alamelu* (1904) 27 Mad. 45. In 17 Bom. 398, the learned judge observed that if the mortgage was not beneficial to and binding upon the wife or was in any way in fraud of her rights, her right of residence would not be affected by the sale. But these observations have been dissented from by Bhashyam Ayyangar, J., in 27 Mad. 45, at p. 51, and also by Shah, J., in *Gangabai* v. *Jankibai* (1921) 45 Bom. 337, at p. 342, 59 I. C. 583, ('21) A. B. 380, who agreed with the view taken by Bhashyam Ayyangar, J.

(b) *A* sells the family dwelling-house without any family necessity to *P*. *P* sues *A* and his wife for possession. *A* then dies leaving his widow. *P* is entitled to possession free from the widow's right of residence.

The reason of the distinction between the rights of the females mentioned in secs. 573 and 574 on the one hand and those mentioned in sec. 575 on the other is that the right which a Hindu wife [s. 575] has of maintenance and residence during her husband's lifetime is a matter of personal obligation arising from the very existence of the relation and quite independent of the possession by the husband of any property, ancestral or self-acquired. The same principle applies as between daughters and their father: see sec. 542 above. It is different, however, in the case of the widows and daughters of deceased coparceners [secs. 573-574], whose right depends on the possession of joint property by the surviving coparceners: see sec. 543.

(*m*) *Manilal* v. *Bai Tara* (1893) 17 Bom. 398; *Jayanti* v. *Alamelu* (1904) 27 Mad. 45.

(*n*) *Gangabai* v. *Jankibai* (1921) 45 Bom. 337, 59 I.C. 583, ('21) A.B. 380.

(*o*) 17 Bom. 398, *supra*, 45 Bom. 337, 59 I. C. 583, ('21) A. B. 380, *supra*.

(*p*) See *Suryanarayana* v. *Balasubramania* (1920) 43 Mad. 635, 56 I.C. 524, ('20) A.M. 106 and 27 Mad. 45, *supra*.

VI.—RIGHT OF MAINTENANCE NOT AFFECTED BY WILL.

Ss. 576-579

576. Right of maintenance not affected by will.—A Hindu cannot so dispose of his property by will as to affect the right of maintenance to which a person is entitled under the Hindu law.

See Restriction No. 1 of Schedule III of the Indian Succession Act, 1925.

VII.—TRANSFER AND ATTACHMENT OF RIGHT OF MAINTENANCE.

577. Transfer of right of maintenance.—A Hindu female cannot transfer her right to *future* maintenance in whatever manner arising, secured or determined (*q*).

This is s. 6, cl. (dd), of the Transfer of Property Act, 1882, as amended by the Transfer of Property (Amendment) Act, 1929.

The maintenance may be fixed by agreement or it may be fixed by a decree of Court. Before the amendment there was a conflict of opinion whether if the maintenance was fixed by a decree, it could be transferred by the widow, the High Court of Calcutta holding that it could (*r*), and the High Court of Madras that it could not (*s*). The Calcutta view is no longer law.

578. Attachment of right of maintenance.—A right to *future* maintenance cannot be attached in execution of a decree, though *arrears* of maintenance may be so attached (*t*).

VIII.—SUIT FOR MAINTENANCE.

579. Suit for maintenance.—(*1*) A widow, who is entitled to maintenance, may sue for all or any of the following reliefs :—

(1) for a declaration of her right to maintenance ;

(2) for arrears of maintenance (*u*) ;

(3) for a charge on a specific portion of her husband's estate for her maintenance and residence (*v*)

(*2*) Where a member of an undivided family comprising several branches dies, and a suit is brought by his widow for maintenance, she is entitled to a decree against all the members of the joint family, and not only against the branch to which her husband belonged and to which his share lapsed by survivorship (*w*).

(*q*) *Narbadabai* v. *Mahadeo* (1881) 5 Bom. 99, 103, 104.

(*r*) *Asad Ali* v. *Haidar Ali* (1911) 38 Cal. 13, 6 I. C. 826.

(*s*) *Ranee Annapurni* v. *Swaminatha* (1911) 34 Mad. 7, 9, 6 I. C. 439.

(*t*) Code of Civil Procedure, 1908, sec. 60, cl. (n) ; *Haridas* v. *Baroda* (1900) 27 Cal. 38 ; *Hoymobutty* v. *Koroona* (1867) 8 W. R. 41.

(*u*) *Pirthee Singh* v. *Rajkooer* (1874) 12 Beng. L. R. 238 I. A. Sup. Vol. 203.

(*v*) *Mahalakshmamma* v. *Venkataratnamma* (1883) 6 Mad. 83.

(*w*) *Subbarayalu* v. *Kamalavallitha Yaramnia* (1912) 35 Mad. 147, 10 I. C. 347.

Ss. 580, 581

580. Limitation.—(*1*) A suit for a declaration of a right to maintenance must be brought within twelve years from the time when the right is denied (*x*).

The refusal by a husband to maintain his wife on the ground of unchastity does not prevent a fresh cause of action arising to her on his death, if it is found that there is no unchastity. A suit within 12 years from the husband's death would be in time (*y*).

(*2*) A suit for arrears of maintenance must be brought within twelve years from the time when the arrears are payable (*z*). Therefore, past maintenance cannot be claimed for a period of more than twelve years.

Arrears.—In order to recover arrears of maintenance, it is necessary to prove that there was a *wrongful withholding* of maintenance for the period for which arrears are claimed (*a*). It is not necessary to prove a *demand* for each year's maintenance as it became payable. At the same time it must be observed that *mere non-payment* of maintenance does not constitute *conclusive* proof of wrongful withholding. But it constitutes *prima facie* proof of wrongful withholding, and if it is coupled with a denial of the plaintiff's right to maintenance, it may constitute sufficient proof of wrongful withholding to entitle the plaintiff to arrears of maintenance (*b*).

Declaration of right to maintenance.—A suit by a Hindu widow for a declaration of her right to maintenance is not barred, merely because it is brought twelve years after the date of her husband's death. The period of limitation runs from the time when her right to maintenance is *denied*. The reason is that the right to maintenance is one accruing from *time to time* according to the wants and exigencies of the person entitled to maintenance (*c*).

581. Execution of decree.—A decree which *directs the payment* of future maintenance from time to time can be enforced by execution (*d*), but a decree which *merely declares* a right of maintenance cannot be so enforced (*e*).

A decree which runs 'the plaintiff's maintenance is fixed at the rate of Rs. 30 per month which the defendant will be liable to pay her every month' is executable. An application by the defendant to reduce the rate of maintenance on the ground of diminution of income cannot be entertained by the executing court (*f*).

If a husband and wife resume co-habitation after a decree for maintenance the decree cannot be executed. If a fresh cause of action arises a fresh decree must be obtained (*g*).

(*x*) Limitation Act, 1908, Sch. I, art. 129.
(*y*) *Mt. Shibbi* v. *Jodh Singh* (1933) 14 Lah. 759, 148 I. C. 479, ('33) A. L. 747.
(*z*) Limitation Act, 1908, Sch. I, art. 128.
(*a*) *Seshamma* v. *Subbarayadu* (1895) 18 Mad. 403.
(*b*) *Raja Yarlagadda* v. *Raja Yarlagadda* (1901) 24 Mad. 147, 27 I.A. 151; *Parvatibai* v. *Chatru* (1912) 36 Bom. 131, 12 I. C. 808.
(*c*) *Narayanrao* v. *Ramabai* (1879) 3 Bom. 415, 6 I.A. 114; *Parvatibai* v. *Chatru, supra.*
(*d*) *Ashutosh* v. *Lukhimoni* (1892) 19 Cal. 139.
(*e*) *Venkanna* v. *Aitamma* (1889) 12 Mad. 183.
(*f*) *Kallu Mal* v. *Barfo* (1938) All. 535, 176 I. C. 139, ('38) A.A. 362.
(*g*) *Vasantam Venkayya* v. *Vasantam Raghavammur* (1942) Mad. 24, 200 I.C. 794, ('42) A.M. 1.

CHAPTER XXVI.

CONVERSION FROM HINDUISM.

[*Preliminary Note.*—We have already considered the consequences of conversion from Hinduism in cases bearing on the Hindu law of partition (s. 325), dissolution of marriage (s. 441), adoption (s. 478), guardianship (ss. 525-526), and maintenance (s. 491). We have also dealt with the law to be applied to Native Christians, that is converts from Hinduism to Christianity [s. 7 (2)]. We propose to consider in the present Chapter the law applicable to Khojas and Cutchi Memons. Khojas and Cutchi Memons are converts from Hinduism to Mahomedanism.]

S. 582 **582. Khojas and Cutchi Memons [The whole of thissection is subject to the provisions of the Shariat Act, 1937(*h*).]**—(*1*) In the absence of proof of special usage to the contrary, Khojas and Cutchi Memons in the Bombay Presidency are governed, in matters of inheritance and succession, by the Hindu law; in other matters they are governed by the Mahomedan law (*i*). The only special usage opposed to the Hindu law of succession hitherto recognized is the usage of the Khojas according to which the mother is entitled to management of property and letters of administration in preference to the childless widow or sister of the deceased (*j*).

(*2*) It was at one time held by the High Court of Bombay that the joint Hindu family system prevailed among Khojas and Cutchi Memons, but the decisions did not make it quite clear how far it prevailed and what incidents of joint property held by a Hindu family applied to joint property held by a Khoja or Cutchi Memon family. On the one hand it was held that a Khoja son was not entitled to a partition of ancestral property against his father in his lifetime (*k*). On the other hand it was held that the right of survivorship (*l*), the incapacity to dispose of ancestral property by will (*m*), and the powers of a father as manager of an ancestral business to borrow money for the business so as to bind the interest of his sons in the ancestral property (*n*),

(*h*) See Mulla's Mahomedan Law, 12th Edn., p. 3.

(*i*) *Khoja's and Memon's* case (1847) Perry O.C. 119; *Shivji Hasam* v. *Datu Mavji* (1875) 12 Bom. H. C. 281 [Khojas]; *Ashabai* v. *Haji Tyeb* (1885) 9 Bom. 115 [Cutchee Memons]; *Mahomed Sidick* v. *Haji Ahmed* (1886) 10 Bom. 1 [Cutchee Memons]; *Adv.-Gen.* v. *Karmali* (1905) 29 Bom. 133, 148; *Jan Mahomed* v. *Datu* (1914) 38 Bom. 449, 22 I.C. 195, ('14) A.B. 59; *Abdurahim* v. *Halimabai* (1916) 43 I.A. 35, 18 Bom. L. R. 635, 32 I. C. 413, ('15) A. PC. 86; *Mangaldas* v. *Abdul* (1914) 16 Bom. L.R. 224, 23 I.C. 565, ('14) A.B. 17; *Advocate-General* v. *Jimbabai* (1917) 41 Bom. 181, 31 I.C. 108, ('15) A.B. 151.

(*j*) *Rahimbhai, in the goods of* (1875) 12 Bom. H. C. 294 [Khojas].

(*k*) *Ahmedbhoy* v. *Cassumbhoy* (1889) 13 Bom. 534 [Khojas].

(*l*) (1883) 9 Bom. 115, *supra* [Cutchee Memons].

(*m*) *Mahomed Sidick* v. *Haji Ahmed* (1886) 10 Bom. 1 [Cutchee Memons].

(*n*) *Haroon Mahomed, in the matter of* (1890) 14 Bom. 189, 194 [Cutchee Memons].

applied also to the joint property held by a Cutchi Memon family. The power of a Khoja father to mortgage family property for family purposes was also judicially recognized (*o*). S. 582

But it has been recently held by that Court that the theory of the joint Hindu family does not apply at all to Khojas and Cutchi Memons, and that neither a Khoja (*p*) nor a Cutchi Memon son (*q*), acquires any interest by birth in property inherited by his father from his ancestors.

The Khojas and Cutchi Memons were originally Hindus. They became converts to Mahomedanism about 500 years ago, but retained the Hindu law of inheritance and succession. Hence the Hindu law of inheritance and succession is applied to them in the Bombay Presidency on the ground of *custom*. This custom is so well established among them, that if a special rule of succession opposed to the Hindu law is alleged to exist among them, the burden of proof lies on the person setting up such rule (*r*). Note that customs overriding Mahomedan law are recognized by 37 Geo. III, c. 142, s. 13, read with 4 Geo. IV, c. 71, s. 9 (for Bombay), and by Bombay Regulation IV of 1827, s. 26 (for the Mufassal of Bombay).

The following is a synopsis of Khoja and Cutchi Memons cases :—

I. Khoja cases—

1. The daughters of a deceased coparcener are entitled against the surviving coparceners to no more than maintenance until marriage and to marriage expenses, as among Hindus : *Khojas and Memon*'s case (*s*).

2. A bequest in favour of *dharam* is void. But the word "charity" in a Khoja will made in the English form and language does not necessarily mean "*dharam*" : *Gangabai* v. *Thavar Mulla* (*t*).

3. By the custom of Khojas when a widow dies intestate and without issue, property acquired by her from her deceased husband does not descend to her blood relations, but to the relations of her deceased husband : *Mulbai, in the goods of* (*u*).

Note.—The same is the rule of Hindu law in cases where the marriage is in an approved form.

4. *Shivji* v. *Dattu* (*v*). This case is cited in sub-s. (*2*).

5. *Rahimbhai, in the goods of* (*w*). This case is cited in sub-s. (*1*).

6. There is no special usage prevailing among Khojas entitling a sister to succeed in preference to a widow : *Rahimatbai* v. *Hirbai* (*x*).

7. *Ahmedbhoy* v. *Cassumbhoy* (*y*). This case is cited in sub-s. (*2*).

(*o*) *Shivji* v. *Datu* (1875) 12 Bom. H. C. 281.
(*p*) *Jan Mahomed* v. *Datu* (1914) 38 Bom. 449, 22 I. C. 195, ('14) A.B. 59.
(*q*) *Mangaldas* v. *Abdul* (1914) 16 Bom. L.R. 224, 23 I.C. 565, ('14) A.B. 17 ; *Advocate-General* v. *Jimbabai* (1917) 41 Bom. 181, 31 I.C. 108, ('15) A.B. 151; *Haji Oosman* v. *Haroon* (1923) 47 Bom. 369, 68 I. C. 862, ('23) A.B. 148.
(*r*) *Mahomed Sidick* v. *Haji Ahmed* (1886) 10 Bom. 1.
(*s*) (1847) Perry O. C. 110.
(*t*) (1863) 1 Bom. H. C. 71.
(*u*) (1866) 2 Bom. H. C. 276.
(*v*) (1875) 12 Bom. H. C. 281.
(*w*) (1875) 12 Bom. H. C. 294.
(*x*) (1879) 3 Bom. 34.
(*y*) (1889) 13 Bom. 534.

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8. The widow of a deceased Khoja is entitled to maintenance out of his property : *Rashid* v. *Sherbanu* (*z*). In this case the Court applied the Mayukha in determining the rights of the parties.

9. In *Advocate-General* v. *Karmali* (*a*) it was said that the will of a Khoja is to be construed on the basis of the testator having the testamentary powers of a Hindu. But the matter is not free from doubt (*b*).

10. A Khoja is not a Hindu within the meaning of the Hindu Wills Act, 1870 : *Abdul Karim* v. *Karmali* (*c*).

11. A gift to a class some of whom are not in existence at the death of the testator is not void in its entirety. The gift in such a case enures for the benefit of those members of the class who were in existence at the testator's death : *Advocate-General* v. *Karmali* (*d*).

II. Cutchi Memon cases—

1. A Cutchi Memon is not a Hindu within the meaning of the Hindu Wills Act, 1870 : *Haji Ismail, in the matter of the will of* (*e*).

2. *Ashabai* v. *Haji Tyeb* (*f*). This case is cited in sub-s. (2).

3. A bequest in favour of an unborn person is void : *Abdul Cadur* v. *Turner* (*g*).

4. *Mahomed Sidick* v. *Haji Ahmed* (*h*). This case is cited in sub-s. (2).

5. *Haroon Mahomed, in the matter of* (*i*). This case is cited in sub-s. (2).

6. When a Cutchi Memon testator bequeathed the residue of his property to his heirs to be divided among them "according to Mahomedan law," it was held that the heirs including the testator's widow took their respective shares *absolutely*, and that she did not take merely a Hindu widow's estate in the property that came to her share : *Hoorbai* v. *Sooleman* (*j*).

7. For the purposes of succession to the *stridhana* of a Cutchi Memon woman her marriage, though performed according to the Mahomedan rites, is deemed to be in the approved form. In this case the Court applied the Mayukha : *Moosa* v. *Haji Abdul* (*k*).

8. A Cutchi Memon widow is entitled to maintenance out of the estate of her deceased husband, and a Cutchi Memon daughter is entitled to maintenance and marriage expenses out of the estate of her father, though he might have left a will which is silent about maintenance and marriage expense : *Haji Saboo Sidick* v. *Ayeshabai* (*l*).

9. As among Hindus, so among Cutchi Memons, an heir who gets into possession of the estate is not bound to pay the creditors rateably as under the Indian Succession Act, 1928, s. 323 : *Haji Saboo Sidick* v. *Ally Mahomed* (*m*).

(*z*) (1905) 29 Bom. 85.
(*a*) (1905) 29 Bom. 133, 148-149. See also *Sallay Mahomed* v. *Lady Janbai* (1901) 3 Bom. L. R. 785.
(*b*) *Hassonally* v. *Popatlal* (1913) 37 Bom. 211, 214-215, 17 I. C. 17 ; *Mangaldas* v. *Abdul* (1914) 16 Bom. L. R. 224, 231, 23 I. C. 565, ('14) A.B. 17 ; *Advocate-General* v. *Jimbabai* (1917) 41 Bom. 181. 31 I.C. 108, ('15) A.B. 151 [a Khoja case].
(c) (1920) 22 Bom. L. R. 708, 58 I. C. 270, ('20) A. B. 140.
(*d*) (1905) 29 Bom. 133.
(*e*) (1882) 6 Bom. 452.
(*f*) (1885) 9 Bom. 115.
(*g*) (1885) 9 Bom. 158.
(*h*) (1886) 10 Bom. 1.
(*i*) (1890) 14 Bom. 189.
(*j*) (1901) 3 Bom. L. R. 790.
(*k*) (1906) 30 Bom. 197.
(*l*) (1903) 27 Bom. 485, 30 I. A. 127.
(*m*) (1906) 30 Bom. 270.

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10. As regards maintenance, Cutchi Memons are governed by the Mahomedan law : *Mahomed Jusab* v. *Haji Adam* (*n*).

11. A Cutchi Memon son does not acquire by birth an interest in property inherited by his father from his ancestors : *Mangaldas* v. *Abdul* (*o*).

12. A Cutchi Memon in Bombay may dispose of the *whole* of his property by will. A Cutchi Memon will is to be interpreted according to Mahomedan law : *Advocate-General* v. *Jimbabai* (*p*). But see No. 14 below.

13. Same ruling as in No. 11 above : *Haji Oosman* v. *Haroon* (1923) 47 Bom. 369, 68 I. C. 862, ('23) A. B. 148.

14. The will of a Cutchi Memon is to be construed according to the rules of Hindu law : *Abdul Sakur* v. *Abubakar* (1930) 54 Bom. 358, 127 I. C. 401, ('30) A. B. 191. *Abdul Sattar Ismail* v. *Abdul Hamid Sait* (1945) Mad. 276.

Memons of Mombasa.—Where Memons migrate from India and settle among Mahomedans (*e.g.*, in Mombasa), the presumption that they have adopted the Mahomedan custom of succession should be readily made. The analogy in such a case is rather a proof of a change of domicile than a change of custom : *Abdurahim* v. *Halimabai* (*q*).

Halai Memons of Porbandar in Kathiawar.—They follow in matters of succession and inheritance Hindu law and not Mahomedan law, differing in that respect from Halai Memons of Bombay : *Khatubai* v. *Mahomed* (*r*).

Halai Memons of Morvi in Kathiawar.—These Memons who have settled at Nadiad in the Kaira district, are governed by Hindu law and not Mahomedan law, in matters of inheritance, succession and wills (*s*).

Sunni Borah of Gujerat and Molesalam Girasias of Broach.—These are governed by the Hindu law in matters of succession and inheritance. These communities were originally Hindus, and became subsequently converts to Mahomedanism (*t*).

Sunni Borahs of Borsad.—These cannot be differentiated from Sunni Borahs of Gujerat. The presumption is that they are governed by the Hindu law of inheritance and succession as applicable to a separated person. There is no presumption that the law relating to joint family is applicable to them (*u*).

Most of the cases cited above were reviewed by Beaman, J., in *Jan Mahomed* v. *Datu* (*v*).

(*n*) (1913) 37 Bom. 71, 15 I. C. 520.

(*o*) (1914) 16 Bom. L. R. 224, 23 I. C. 565, ('14) A.B. 17.

(*p*) (1917) 41 Bom. 181, 283, 31 I. C. 108, ('15) A.B. 151.

(*q*) (1916) 43 I.A. 35, 18 Bom. L.R. 635, 32 I.C. 413, ('15) A.PC. 86.

(*r*) (1923) 50 I.A. 108, 47 Bom. 146, 72 I.C. 202, ('22) A.PC. 414, affing. *Mahomed Haji Abu* v. *Khattubai* (1919) 43 Bom. 647, 51 I. C. 513, ('18) A.B. 39 (Porbandar): *Aisha Bee Bee* v. *Noor Mohammed* (1932) 10 Rang. 461, 140 I C. 143, ('32) A. R. 179 (Gondal).

(*s*) *Adambhai* v. *Allarakhia* (1935) 37 Bom. L.R. 686, ('35) A.B. 417.

(*t*) *Bai Baiji* v. *Bai Santok* (1896) 20 Bom 53; *Fatesangji* v. *Harisangji* (1896) 20 Bom. 181.

(*u*) *Bai Sakar* v. *Vara Ismail* (1936) 60 Bom. 919, 38 Bom. L. R. 1034, 167 I.C. 380, ('37) A. B. 65.

(*v*) (1914) 38 Bom. 449, 22 I. C. 195, ('14) A.B. 59.

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583. The Cutchi Memons Act, 1920.—It is now provided by the Cutchi Memons Act, 1920, and the Cutchi Memons (Amendment) Act, 1923, that any person who satisfies the prescribed authority—

(a) that he is a Cutchi Memon and is the person whom he represents himself to be,

(b) that he is competent to contract within the meaning of section 11 of the Indian Contract Act, 1872, *and*

(c) that he is resident in British India,

may by declaration in the prescribed form and filed before the prescribed authority declare that he desires to obtain the benefit of this Act, and thereafter the declarant and all his minor children and their descendants shall in matters of succession and inheritance be governed by the Mahomedan law. A similar Act has been passed with reference to all Muslims in British India providing for the application of the personal law of Muslims instead of customary law (Act XXVI of 1937). See Mulla's Mahomedan Law, 12th Edition, p. 3.

CHAPTER XXVII.

IMPARTIBLE PROPERTY.

584. Impartible Property.—(*1*) Property, although partible by nature, may, by custom, or by the terms of a grant by Government, be impartible, in the sense that it always devolves on a single member of the family to the exclusion of the other members. **Ss. 584, 585**

(*2*) An impartible estate may be ancestral, or it may be self-acquired.

The following are instances of impartible properties:—

(1) Ancient Zamindaries, which partake of the nature of a Raj or sovereignty; (2) Zamindaries which descend to a single member by special family custom (*w*); (3) Palayams in the Madras Presidency (*x*); (4) royal grants of revenue for services, such as Jaghirs (*y*) and Saranjams (*z*) in Bombay; (5) service tenures such as Digwari tenure (*a*), and tenures attached to village offices in Madras (*b*). The discontinuance of services attached to an impartible watan does not make it partible (*c*). See also Bengal Regulations 11 of 1793, and 10 of 1800.

The Crown has power in British India by a grant of lands to limit their descent in any way it pleases, but a subject has no power to impose upon lands, or other property any limitation of descent at variance with the ordinary law applicable (*d*).

585. Property impartible by custom.—Where it is alleged that an estate is impartible by custom, either territorial or of the family, the burden of proof of the custom lies on those who allege it. The custom must be ancient and invariable, and established by clear and unambiguous evidence. Only an estate of considerable age can be considered as being governed by an ancient and invariable custom; it is doubtful whether an estate of which the origin dated back only to 1796 could be regarded at the settlement in 1863 as being so governed (*e*).

A settlement of regrant by the British Government of an estate which existed before the British rule must be presumed, in the absence of evidence to the contrary, to continue previously existing incidents of impartibility and descendibility to a single heir (*f*).

(*w*) See *Baijnath* v. *Tej Bali Singh* (1921) 48 I. A. 195, 43 All. 228, 60 I.C. 534, ('21) A.PC. 62.

(*x*) *Kachi* v. *Kachi* (1905) 28 Mad. 508, 32 I. A. 261.

(*y*) See *Raghojirao* v. *Lakshmanrao* (1912) 36 Bom. 639, 39 I. A. 202, 16 I. C. 239.

(*z*) *Ramchandra* v. *Venkatrao* (1882) 6 Bom. 598; *Narayan* v. *Vasudeo* (1891) 15 Bom. 247.

(*a*) *Durga Prasad Singh* v. *Brajanath Bose* (1912) 39 Cal. 696, 39 I. A. 133, 15 I. C. 219.

(*b*) *Bada* v. *Hussu Bhai* (1884) 7 Mad. 236.

(*c*) *Radhabai* v. *Anantrao* (1885) 9 Bom. 198 [Service Vatan]. *Mahatab Singh* v. *Badan Singh* (1921) 48 I. A. 416, 461, 48 Cal. 997, 64 I. C. 194, ('22) A.PC. 146.

(*d*) *Rajendra* v. *Raghubans* (1918) 45 I. A. 134, 40 All. 470, 48 I.C. 213, ('18) A.PC. 25; *Ramrao* v. *Yeshvantrao* (1886) 10 Bom. 227 [Deshpande Vatan].

(*e*) *Martand Rao* v. *Malhar Rao* (1928) 55 I. A. 45, 55 Cal. 403, 107 I. C. 7, ('28) A.PC. 10.

(*f*) *Martand Rao* v. *Malhar Rao*, *supra*.

Ss. 586, 587

586. Accretions to impartible property.—It is open to the holder of an impartible estate to incorporate any self-acquired property of his with the estate, but an intention to do so either expressed or implied, must be established and whereas in the case of a lunatic he is incapable of expressing his intention, the Court has to consider what is beneficial to him (*g*). The income of an ancestral impartible joint estate is not so affected by its origin that it should be assumed to accrete to the estate. The income when received is the absolute property of the holder of the estate. It differs in no way from property which he might have gained by his own effort, or acquired in circumstances entirely dissociated from the ownership of the estate. Therefore the principle applicable to ordinary joint family estate that self-acquired moneys are to be regarded as joint property if mixed with the money of the joint family, does not necessarily apply to property acquired by the holder of an impartible estate out of the income (*h*).

Thus where the deceased holder of an ancestral impartible estate had applied savings out of the income to purchasing immoveable properties and making loans, the rents and interest being received by the manager of the estate and treated in his books as part of the estate, it was held by their Lordships of the Privy Council that the property so acquired had not become part of the impartible estate, but remained the separate property of the deceased holder (*i*). Whether any immoveable property acquired out of the income has been incorporated with the impartible estate depends on the intention of the holder but moveable property such as the income of the impartible estate cannot be so incorporated (*j*).

It follows from the principles laid down in the section that the right to recover arrears of rent become due in the lifetime of the last holder passes to his heirs, and not to the person who succeeds to the estate (*k*).

587. Impartible property whether coparcenary property.—In considering whether an ancestral impartible estate is coparcenary property or not, a distinction should be drawn between present rights, that is, the right to demand a partition and the right to joint enjoyment, and future rights. In the case of an *impartible* estate, the right to *partition* and the right of joint enjoyment are from the very nature of the property incapable of existence, and there is no coparcenary to this extent. No

(*g*) *Someshwari Prasad* v. *Mahashwari Prasad* (1936) 63 I. A. 441, 16 Pat. 1, 165 I.C. 347, ('36) A.PC. 332.

(*h*) *Jagadamba Kumari* v. *Narain Singh* (1923) 50 I. A. 1, 2 Pat. 319, 77 I. C. 1041, ('23) A.PC. 59; *Janki Pershad* v. *Dwarka Pershad* (1913) 40 I. A. 170, 181, 35 All. 391, 401, 20 I. C. 73; *Murtaza Husain Khan* v. *Muhomed Yasin* (1916) 43 I. A. 269, 281, 38 All. 552, 567, 36 I. C. 299, ('16) A.PC. 89; *Srimati Parbati* v *Jagadis Chunder* (1902) 29 Cal. 433, 453, 29 I. A. 82, 98.

(*i*) (1923) 50 I. A. 1, 2 Pat. 319, 77 I. C. 1041, ('23) A.PC. 59, *supra*: *Hargovind Singh* v. *Collector of Etah* (1937) All. 292, 169 I. C. 714, ('37) A.A. 377.

(*j*) *Shibaprasad Singh* v. *Prayag Kumari Debee* (1922) 59 Cal. 1399, 59 I.A. 331, 138 I. C. 861, ('32) A.PC. 216.

(*k*) *Aparna* v. *Sree Shiba Prasad* (1924) 3 Pa 367, 83 I. C. 623, ('24) A. P. 451.

coparcener, therefore, can prevent alienations of the estate by the holder for the time being either by gift or by will [s. 588], nor is he entitled to maintenance out of the estate [s. 589]. But as regards future rights, that is, the right to survivorship, the property is to be treated as coparcenary property, so that on the death intestate of the last holder, it will devolve by survivorship according to the rules stated in sec. 591 below (*l*). The right of a junior member to succeed to the estate by survivorship is not a mere *spes successionis* but a right of property which can be transferred (*m*). **Ss. 587-589**

"Where property is held in coparcenary by a joint Hindu family, there are ordinarily three rights vested in coparceners—the right of joint enjoyment, the right to call for partition, and the right to survivorship. Where impartible property is the subject of such ownership, the right of joint enjoyment and the right of partition as the right of an undivided coparcener are, from the nature of the property, incapable of existence. But there being nothing in the nature of the property inconsistent with the right of survivorship, it may be presumed that that right remains" (*n*). The right of survivorship is not affected by the impartible nature of the property, so that if the family were joint and the last holder died intestate, the estate would devolve by survivorship according to the rules stated in sec. 591 below.

588. Alienation of impartible property.—(*1*) The holder of an impartible estate has power to alienate the estate, though ancestral, by gift or by will, unless the power of alienation is excluded by special family custom or by the nature of the tenure (*o*). The absence of any instance in which a previous holder has alienated the estate by gift or will is not by itself sufficient evidence to establish such a custom (*p*).

(*2*) Where the estate is by custom inalienable, the holder cannot alienate it except for legal necessity (*q*) [s. 528].

See the Madras Impartible Estates Act, 1904, and the Arni Jagir Act, 1909.

589. Right to maintenance out of impartible property.—(*1*) No coparcener has any present rights in an impartible estate [s. 587]. Apart, therefore, from custom and relationship to the holder, the junior members of the family have no right to maintenance out of such estate (*r*). The Judicial committee

(*l*) *Baij Nath* v. *Tej Bali Singh* (1921) 48 I.A. 195, 211-213, 43 All. 228, 60 I.C. 534; *Konammal* v. *Annadana* (1928) 55 I. A. 114, 51 Mad. 189, ('28) A. PC. 68.

(*m*) Sellapa v. *Suppan* (1937) Mad. 906, 171 I.C. 216, ('37) A. M. 496.

(*n*) *Naraganti* v. *Venkatachalapati* (1882) 4 Mad. 250, 266, approved in *Kachi Kaliyana* v. *Kachi Yuva* (1905) 32 I.A. 261, 28 Mad 508; and *Baijnath* v. *Tej Bali Singh* (1921) 48 I. A. 195, 43 All. 228, 60 I. C. 534, ('21) A. PC. 62.

(*o*) *Rani Sartaj Kuari* v. *Deoraj Kuari* (1888) 15 I. A. 51, 10 All. 272 [gift]; *Sri Raja Venkata Surya* v. *Court of Wards* (1899) 26 I. A. 83, 22 Mad. 383; *Protap Chandra* v. *Jagadish Chandra* (1927) 54 I. A, 289, 54 Cal. 955, 102 I. C 599, ('27) A. PC 159; *Raja Madhusudan* v. *Kheshtabasi* (1929) 8 Pat. 932, 121 I. C. 462 ('30 A P 137, where it was held dissenting from *Gopal Prasad* v. *Raghunath* (1905) 32 Cal. 158, that the Killajat Mahal of Orissa known as Patia Killah was alienable.

(*p*) *Protap Chandra* v *Jagadish Chandra*, *supra*

(*q*) *Gopal* v. *Raghunath* (1905) 32 Cal. 158

(*r*) *Raja Rama Rao* v *Raja of Pittapur* (1918) 45 I.A. 148, 41 Mad 778, 47 I. C. 354, ('18) A. PC. 81, affmg. *Sri Rajah Ram Row* v *Rajah of Pittapur* (1916) 39 Mad. 396, 29 I. C. 356, ('16) A. M. 27 (1927) 54 I. A 289, 54 Cal. 955, 102 I. C. 599, ('27) A. PC. 159, *supra*

S. 589 has recently held that the illegitimate sons of a junior member are not, under the Law, entitled to maintenance. In the particular case the claim was also based on a deed of maintenance. Their Lordships held that the words "Purusha Santhathi either way of Aurasa or by way of adoption" do not include an illegitimate son (*s*).

(*2*) Where an impartible estate is held as ancestral or joint family property, the *sons* of the holder thereof are entitled, by custom, to maintenance out of the estate. This custom has so often been judicially recognized that it is not necessary to prove it in each case (*t*). But where the impartible property is the self-acquired property of the holder, his son is not entitled to maintenance out of it (*u*).

(*3*) There is no invariable custom by which any member of the family beyond the first generation from the last holder [*e.g.*, the last holder's grandsons] can claim maintenance as of right (*v*).

Illustration.

The holder of an impartible Raj adopts a son to him. He then devises the Raj by will to a son born of one of his wives after the adoption. After the Raja's death a son of the adopted son sues the devisee for maintenance. No evidence is given of any special custom by which *grandsons* of the last holder can claim maintenance as of right Is the plaintiff entitled to maintenance ? No. He cannot claim maintenance as a coparcener, for no coparcener has any *present* rights in an impartible property [s. 587]. He is not entitled to maintenance on the ground of personal relationship, for a Hindu is under no personal obligation to maintain a *grandson* [s. 542]. Nor is he entitled to maintenance by custom, there being no evidence of any special custom: *Raja Rama Rao* v. *Raja of Pittapur* (1918) 45 I.A. 148, 41 Mad. 778, 47 I.C. 354, ('18) A.PC. 81.

Grants made out of the revenues of an impartible estate for the maintenance of the junior members of the family and their direct male line revert, on the death of the last male heir of the grantee, to the estate (*w*).

The amount of maintenance payable to a junior member of a family holding an impartible estate as such is not assessable to income-tax (*x*).

(*s*) *Raja Valugoti Sarvagna Kumara Krishna Yachendra Bahadur Vars* v. *Raja Rajendra Rao & Ors.* (1942) Mad. 419, 198 I.C. 166, 68 I.A. 181, ('42) A.PC. 3.

(*t*) *Sri Rama Rao* v. *Raja of Pittapur* (1921) 45 I. A. 148, 41 Mad. 778, 47 I. C. 354, ('18) A. PC. 81; *Rani Sartaj Kuari* v. *Deoraj Kuari* (1888) 15 I. A. 51, 10 All. 272; *Raja Yarlagadda* v. *Yarlagadda* (1900) 27 I.A. 151, 24 Mad. 147; *Katchi Kaliyana* v. *Kachi Yuva* (1905) 32 I. A. 261, 28 Mad. 508.

(*u*) *Subbayya Tevar* v. *Marudappa Pandian* (1937) Mad. 42, ('36) A. M. 828; *Hargovind Singh* v. *Collector of Etah* (1937) All. 292, 169 I. C. 744, ('37) A.A. 377.

(*v*) 45 I.A. 148, 41 Mad. 778, 47 I.C. 354, ('18) A. PC. 81, *supra*; *Nilmony* v. *Hinqoo Lall* (1880) 5 Cal. 256, 259. In Madras the rule is now modified by Madras Act XII of 1934.

(*w*) See *Durgadut* v. *Rameshwar* (1909) 36 I. A. 176, 36 Cal. 943, 4 I.C. 2 [Babuana grant]; *Ekradeshwar* v. *Janeshwari* (1914) 41 I.A. 275, 42 Cal. 582, 25 I.C. 417, ('14) A. PC. 76 [Sohag grant]; *Someshwari Prasad* v. *Maheshwari Prasad* (1936) 63 I. A. 441, 16 Pat. 1, 165 I.C. 347, ('36) A. PC. 332.

(*x*) *Commissioner of Income-tax* v. *Zamindar of Chemudu* (1934) 57 Mad. 1023, 151 I.C. 926, ('34) A. M. 608; *Vijayananda Gajpatiraus* v. *Commissioner of Income-tax* (1934) 56 All. 1009.

The income of the house property (part of an impartible estate) to which the assessee has succeeded by the rule of *primogeniture* is not chargeable in his hands for the purposes of section 9 of the Income-tax Act as an individual. But interest is so chargeable for purposes of sections 8 and 12 (*y*). **Ss. 589, 590**

Succession to impartible estate.

590. General principles.—(*1*) The general principles in regard to succession to an impartible estate are well established. *The first principle* is that the succession is governed by the rules which govern the succession to *partible* property, subject to such modifications only as flow from the character of the property as an impartible estate. *The second principle* is that the only modification which impartibility suggests in regard to the right of succession is the existence of a special rule for the selection of a single heir when there are several heirs of the same class who would be entitled to succeed to the property if it were partible under the general Hindu law. *The third principle* is that, in the absence of a special custom, the rule of primogeniture furnishes a ground of preference. In determining the single heir, we have first to ascertain the class of heirs who would be entitled to succeed to the property if it were partible, regard being had to its nature as joint or separate property, and we have next to select the single heir, applying the special rule (*z*).

(*2*) *Sons.*—According to the rule of primogeniture, if the last owner dies leaving sons, the eldest son is entitled to succeed. The eldest son is the son who was *born first*, not the first born son of the senior wife (*a*), unless there is a family custom that the sons take rank according to the seniority of their mother (*b*). Therefore the son of a junior wife succeeds in preference to the later born son of a senior wife, or, of the first married wife.

So long as the line of the eldest son continues in possession, the estate will pass in that line. That is to say, on the death of the eldest son, leaving sons, it will pass to his

(*y*) *Commissioner of Income-tax, Punjab* v. *Krishna Kishore* (1942) Lah. I, 196 I.C. 707, 68 I.A. 155, ('41) A. PC. 120.

(*z*) *Subramanya* v. *Siva Subramanya* (1894) 17 Mad. 316, 325, cited with approval in *Parbati Kunwar* v. *Chandarpal Kunwar* (1909) 36 I. A. 125, 136, 31 All. 457, 475-476, 4 I.C. 25; *Katama Natchiar* v. *Rajah of Shivagunga* (1863) 9 M. I. A. 543, 2 W. R. P. C. 31; *Baijnath* v. *Tej Bali Singh* (1921) 48 I. A. 195, 212, 43 All. 228, 244, 60 I. C. 534, ('21) A. PC. 62; *Mutturadugunadha Tevar* v. *Periasami* (1896) 23 I. A. 128, 137, 19 Mad. 451, 457; *Raja Jogendra* v. *Nityanund* (1890) 17 I. A. 128, 131, 18 Cal. 151, 154.

(*a*) *Ramalakshmi* v. *Sivanantha* (1872) 14 M. I. A. 570, 17 W. R. 553; *Jagdish Bahadur* v. *Sheo Partab* (1901) 28 I. A. 100, 23 All. 369.

(*b*) *Ramasami* v. *Sundaralingasami* (1894) 17 Mad. 422, affmd. *Sundarlingasami* v. *Ramasami* (1899) 26 I. A. 55, 22 Mad. 515.

Ss. 590, 591

eldest son and not to his brother (*c*). See ill. to sec. 591. As to the effect of adoption in families owning impartible estate on other branches see secs. 472 and 506.

If an aurasa son is born after the adoption, the former alone succeeds to the impartible estate (*d*).

(*3*) *Illegitimate son of a Sudra.*—If the holder of an impartible estate, belonging to the Sudra caste, dies leaving a legitimate son and also an illegitimate son, the legitimate son would be preferred to the illegitimate son; this seems to follow from the fact that on a partition the legitimate son is so largely preferred (*e*). If there has been no partition between the sons, and the legitimate son dies without leaving male issue, but leaving a widow and daughters, the illegitimate son would, as in the case of partible property, succeed by survivorship in preference to the widow and daughters of the legitimate son (*f*) [s. 312].

(*4*) *Whole and half-blood.*—Nearness of blood is no ground of preference under the Mitakshara law in case of disputed succession to *coparcenary* property which is partible, and it is likewise no ground of preference when such property is impartible. Therefore, in a *joint* family, an elder brother of the half-blood is entitled to succeed to an impartible ancestral estate in preference to a younger brother of the whole blood. But the latter would succeed in preference to the former, if the estate was the separate or self-acquired property of the last holder (*g*), or if the case was governed by the Dayabhaga (*h*).

(*5*) *Fresh stock of descent.*—As in the case of succession to partible property, so in the case of impartible property each male owner becomes a fresh stock of descent (*i*).

591. Where estate ancestral, and last owner undivided.—(*1*) Where the impartible estate is ancestral, the successor to the estate in a joint family governed by the Mitakshara is designated by survivorship. The estate passes by survivorship from one line to another according to primogeniture,

(*c*) (1894) 17 Mad. 422, 434, *supra*.

(*d*) *Sahebgouda* v. *Shiddangouda* (1939) Bom. 314.

(*e*) *Ramasami* v. *Sundarlingasami* (1894) 17 Mad. 422, 434-435.

(*f*) *Raja Jogendra* v. *Nityanund* (1890) 17 I. A. 128, 131, 18 Cal. 151, 154.

(*g*) *Subramanya* v. *Siva Subramanya* (1894) 17 Mad. 316, also 17 Mad. 422, *supra*.

(*h*) *Neelkisto Deb* v. *Beerchunder* (1869) 12 M. I.A. 523, 12 W. R. P. C. 21 [the Tipperah Raj case].

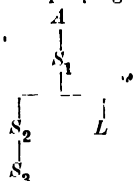
(*i*) *Muttuvaduganadha Tevar* v. *Periasami* (1896) 23 I.A. 128, 19 Mad. 151.

and devolves not on the member nearest in blood, but on the eldest member of the senior branch (*j*). **Ss. 591, 592**

(*2*) In the absence of custom a female cannot inherit an impartible ancestral estate belonging to a joint family governed by the Mitakshara, where there are any male members of the family who are qualified to succeed to the estate (*k*). But where she is the widow of the last survivor, the law of succession to separate property applies, and she can succeed as in the case of partible property (*l*) [s. 592].

Illustration.

In the accompanying diagram, *A* stands for the last holder; S_1 is his son, S_2 and *L* are the two sons of S_1, *L* being the younger of the two; S_3 is the son of S_2. *A* dies leaving S_3 and *L*. S_3, being the surviving member of the *senior line*, is entitled to succeed in preference to *L*, though *L* is one degree nearer to the common ancestor (*A*) than S_3: *Baij Nath* v. *Tej Bali Singh* (1921) 48 I. A. 195, 43 All. 228, 60 I.C. 534, ('21), A. PC. 62.



592. Where estate ancestral, but last owner divided.—(*1*) Where the impartible estate is ancestral, but the last holder was separated, the estate in cases governed by the Mitakshara will descend according to the ordinary rules of succession applicable to partible property (*m*). Thus if the last holder dies without leaving male issue, but leaving a widow, the estate will pass, in the absence of any custom to the contrary, to the widow (*n*), and, if there be no widow, to his daughter (*o*). If there be none of these, the estate will, if there be no indication to the contrary, descend according to the rule of primogeniture. In that case if there are more persons than one standing in the same degree of relationship to the last holder, the eldest, if all belong to the same line, and the eldest in the senior branch, if there are more branches than one, will be the preferable heir [s. 43].

(*j*) *Baijnath* v. *Tej Bali Singh* (1921) 48 I.A. 195, 43 All. 228 60 I.C. 534, ('21) A.PC. 62 affmg. 38 All. 590, 38 I.C. 894; *Kachi Kaliyana* v. *Kachi Yuva* (1905) 32 I.A. 261, 28 Mad. 501; *Naraganti* v. *Nayanivaru* (1882) 4 Mad. 250; *Sahebgouda* v. *Basangouda* (1931) 33 Bom. L.R. 580, 133 I.C. 847, ('31) A.B. 378; *Shibaprasad Singh* v. *Prayag Kumari Debee* (1932) 59 Cal. 1399, 59 I.A. 331, 138 I.C. 861, ('32) A.PC. 216.

(*k*) *Hiranath Koer* v. *Baboo Ram* (1872) 9 Beng. L. R. 274; *Chowdry Chintamun* v. *Mussamut Nowlukho* (1875) 2 I.A. 263, 1 Cal 153.

(*l*) See *Sri Rajah Yenumula* v. *Yenumula* (1870) 6 Mad. H.C. 93, 109.

(*m*) *Chuni Lal Official Receiver* v. *Jai Gopal* (1936) 17 Lah. 378, 163 I.C. 103, ('36) A.L. 55.

(*n*) *Thakurani Tara Kumari* v. *Chaturbhuj* (1915) 42 I.A. 192, 42 Cal. 1179, 30 I.C. 833, ('15) A.PC. 30. See also *Sri Rajalakshmi Devi* v. *Sri Raja Surya* (1897) 24 I.A 118, 20 Mad. 256.

(*o*) See *Mst. Parbati Kunwar* v. *Chandarpal Kunwar* (1909) 36 I. A. 125, 31 All. 457, 4 I.C. 25 [custom applicable both to partible and impartible estates].

Ss. 592-595

(2) The onus of proving a custom excluding females from succession to a separate impartible estate rests upon the person who sets up the custom (*p*).

In some cases another rule of selection and not primogeniture may be the governing rule of the family (*q*).

593. Proof of separation where estate ancestral.—In order to establish that an impartible estate has ceased to be joint property for the purpose of succession, it is necessary to prove an intention, express or implied, on the part of the junior members of the family, to give up their chance of succeeding to the estate. A mere separation in general status is not sufficient (*r*).

594. Where estate self-acquired.—Where an impartible estate is self-acquired property, the estate in cases governed by the Mitakshara follows the course of succession as to separate property [s. 592], though the last holder was undivided at the time of his death (*s*) [s. 43].

Illustration.

The holder of an impartible Zamindari dies leaving a widow and undivided nephews. It is proved that the Zamindari was his self-acquired property. The widow is entitled to succeed in preference to the nephews: *The Shivagunga* case (1863) 9 M. I. A. 539.

A Hindu governed by Mitakshara law who took a vested interest in an ancestral impartible estate under a deed of settlement executed by his father while his elder brother was alive and before the coming into force of the Madras Impartible Estates Act took the estate as self-acquired property.' His widow succeeds to him as heir in preference to his half-brother (*t*).

594A. A decree was passed against the holder of an impartible estate for compensation in lieu of specific performance of a contract to transfer a part of the estate. It was held that as the decree was passed against the defendant in a representative capacity it could be executed against his son and successor (*u*).

595. Dayabhaga school.—In cases governed by the Dayabhaga, the heir will be the eldest member of the class of persons which is nearer of kin to the last owner than any other class [s. 88].

(*p*) *Amerandra* v. *Banamali* (1931) 10 Pat. 1, 123 I.C. 770, ('30) A.P. 417.

(*q*) *Ishri Singh* v. *Baldeo Singh* (1884) 11 I.A. 135, 10 Cal. 792; *Achal Ram* v. *Udai Partab* (1884) 11 I.A. 51, 1 Cal. 51; *Mohesh Chunder* v. *Satrughan* (1902) 29 I.A. 62, 29 Cal. 343.

(*r*) *Konammal* v. *Annadana* (1928) 55 I.A. 114, 51 Mad. 189, 108 I.C. 354, ('28) A.PC. 68; *Jagadamba Kumari* v. *Narain Singh* (1923) 50 I.A. 1, 2 Pat. 319, 77 I.C. 1041, ('23) A.PC. 59; *Ram Sundar* v. *Collector of Gorakhpur* (1930) 52 All 793, 126 I.C. 237, ('30) A. A. 797, affirmed by P. C. in *Collector of Gorakhpur* v. *Ram Sundar Mal* (1934) 56 All. 468, 61 I.A. 286, 150 I.C. 545, ('34) A.PC. 157; *Lingappa Rayappa* v. *Kadappa Bapurao* (1940) Bom. 721, 191 I.C. 504, ('40) A.B. 345.

(*s*) *Katama Natchiar* v. *Rajah of Shivagunga* (1863) 9 M.I.A. 539, 2 W. R. P. C. 31; *Periasami* v. *Periasami* (1878) 5 I.A. 61, 1 Mad. 312.

(*t*) *Ulagalam Perumal Sethurayan* v. *Rama Subbalakshmi Nachiar* (1939) Mad. 443.

(*u*) *Rao Bhimsingh* v. *Gangaram* (1941) Nag. 632, 193 I.C. 598, ('40) A.N. 278.

CHAPTER XXVIII.

THE LAW OF DAMDUPAT.

596. The rule of damdupat.—The rule of *damdupat* is a branch of the Hindu law of Debts. According to this rule, the amount of interest recoverable *at any one time* cannot exceed the principal (*v*). **S. 593**

Illustration.

A lends Rs. 1,000 to *B* at interest at 15 per cent. per annum. *A* allows the interest to run into arrears until it amounts to Rs. 1,200, that is, until it *exceeds* the principal (Rs. 1,000). *A* then sues *B* to recover Rs. 2,200, that is, Rs. 1,000 for principal and Rs. 1,200 for interest. *A* is not entitled to more than Rs. 1,000 for interest, as that is the amount of the principal. But if *B* pays *A* Rs. 400 for interest *before* suit, and *A* then sues *B* to recover Rs. 1,800, that is, Rs. 1,000 for principal and Rs. 800 for interest, *A* is entitled to Rs. 800 for interest, for it *does not exceed* the principal Rs. 1,000, though he will thereby be getting Rs. 1,200 in all for interest. The reason is that the payment of Rs. 400 and the payment of Rs. 800 would be payments *at different times*, and all that the rule of damdupat says is that a creditor is not entitled *at any one time* to recover interest exceeding the amount of the principal. The rule of damdupat does not say that a creditor shall not *in any case* be entitled to interest exceeding the principal. The result is that part payments of interest made before suit cannot be added to the amount of interest claimed in the suit so as to attract the application of the rule of damdupat.

Reason of the rule.—The Hindu law did not recognise any rule of limitation for the recovery of debts. Every debt which was lawful was binding and recoverable from the debtor irrespective of the period which may have elapsed since the original liability was incurred. It thus became necessary to impose a restriction on the amount of interest recoverable by the creditor, and such a restriction has been imposed by the rule of damdupat (*w*).

The Deccan Agriculturists' Relief Act, 1879, *sec.* 13, *cl.* (g).—The rule of *damdupat* has been enacted in sec. 13, cl. (g), of the above Act.

The Usury Laws Repeal Act, 1855.—The rule of *damdupat* is not superseded by the Usury Laws Repeal Act, 1855. According to that Act, the Court is bound to award interest at the contract rate, *whatever the rate of interest may be*. But in cases to which the rule of *damdupat* applies, the creditor cannot at any one time recover interest exceeding the amount of the principal (*x*).

The Indian Limitation Act, 1908.—The rule of *damdupat* is not affected by the Limitation Act. According to that Act, the period of limitation for a suit for money lent is three years from the date of the loan. A creditor, therefore, may sue for the loan and for arrears of interest for three years, *whatever the interest may amount to*. But in cases to which the rule of *damdupat* applies, he cannot at any one time recover interest exceeding the amount of the principal (*y*).

(*v*) *Dhondu* v. *Narayan* (1863) 1 Bom. H.C. 47; *Hariram* v. *Madan Gopal* (1928) 33 C. W. N 493, 497, 114 I.C 565, ('29) A.PC. 77.

(*w*) *Gajadhar* v. *Jagannath* (1924) 46 All 775, 782, 80 I.C. 684, ('24) A A. 551 [F.B.].

(*x*) *Khushalchand* v. *Ibrahim* (1866) 3 Bom. H.C. A.C. 23; *Hakma Manji* v. *Memon Ayab* (1870) 7 Bom. H. C. O. C 19, *Ganpat* v. *Adarji* (1879) 3 Bom 312, 338, *Ramcoomoy* v. *Johur Lall* (1880) 5 Cal. 867.

(*y*) (1879) 3 Bom. 312, 332. *supra*, *Hari* v. *Balambhat* (1885) 9 Bom. 233.

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597. Where part of the principal has been paid.—Where a loan is repayable by instalments, and some of the instalments have been paid, or even where it is not payable by instalments but a part thereof has been paid, the principal for the purpose of the rule of *damdupat* is the *balance* of principal remaining due when the interest claimed in the suit accrued (z).

Illustration.

A lends Rs. 200 to *B* at interest at the rate of 10 per cent. per annum. The loan is payable by four instalments of Rs. 50 each. *B* pays the first three instalments and all interest due thereon. *A* then sues *B* to recover the last instalment of Rs. 50 and interest *thereon* amounting to Rs. 65. *A* is not entitled to more than Rs. 50 for interest, that being the amount of principal *remaining due* when the interest accrued. It does not matter that the original principal was Rs. 200.

598. Capitalization of interest by subsequent agreement.—The rule of *damdupat* does not forbid the conversion, by *subsequent* agreement between the debtor and the creditor, of the interest in arrear into capital. Therefore, when a *fresh* bond is passed by the debtor for the *aggregate* amount of the principal and interest due under the *old* bond, the principal for the purpose of the rule of *damdupat* is the amount of the *fresh* bond (a).

Illustration.

B borrows Rs. 500 from *A* at interest at the rate of 10 per cent. per annum and passes a promissory note to *A* for that amount. No interest is paid by *B* for two years. At the end of the second year, the interest due to *A* is Rs. 100. *A* demands the Rs. 500 *plus* Rs. 100 from *B*. *B* is unable to pay the amount, and he passes a *fresh* promissory note to *A* for Rs. 600, that is, Rs. 500 (principal) *plus* Rs. 100 (interest in arrear), promising to pay interest on the Rs. 600 at the same rate as before. *A* subsequently files a suit against *B* to recover Rs. 600, the principal amount secured by the second promissory note, and Rs. 550, the interest in arrear on that amount. What is the *principal* for the purpose of the rule of damdupat, is it Rs. 500, the amount of the first note or is it Rs. 600, the amount of the second note ? The answer is that it is Rs. 600, the amount of the *second* note. Therefore, *A* is entitled to Rs. 550 for interest, for though it exceeds the original principal sum of Rs. 500, it does not exceed the principal payable under the second note, namely, Rs. 600. It does not matter that a part of the principal of Rs. 600 consisted originally of interest. It was quite competent to *A* and *B* ***at any time after the date of the first promissory note*** to agree that the sum of Rs. 100, which represented the interest in arrear, should be treated as capital so as to carry interest on it. But if *A* and *B* had agreed, *when the original loan of Rs. 500 was made*, that all interest in arrear should be capitalized and should carry interest on it as if it was a principal sum, the agreement could not affect the operation of the rule of damdupat, and *A* would not be entitled to more than Rs. 500 for interest.

599. The rule of damdupat does not apply after suit.—Where a suit has been instituted to recover a loan, the rule of *damdupat* ceases to operate. The result is that though the

(z) *Dagdusa* v. *Ramchandra* (1896) 20 Bom. 611; *Nusserwanji* v. *Laxman* (1906) 30 Bom. 452.

(a) *Sukalal* v. *Bapu* (1900 24 Bom. 305.

Court is bound to apply the rule of *damdupat* up to the date of the suit, it is free to award interest to the creditor at such rate as it thinks proper from the date of the suit up to the date of decree or payment upon the total amount that may be found due to him after applying that rule (*b*). **Ss. 599-601**

Illustration.

A lends Rs. 1,000 to *B* at interest at the rate of 25 per cent. per annum. *A* then sues *B* to recover Rs. 2,500 of which Rs. 1,000 is for principal and Rs. 1,500 is for interest. *A* is not entitled to a decree for more than Rs. 2,000 but the Court may, under section 34 of the Code of Civil Procedure, 1908, award interest on Rs. 2,000 at such rate as it thinks proper *from the date of the suit* up to the date of the decree, and it may award further interest on the *aggregate sum* consisting of Rs. 2,000 *plus* the interest between date of suit and the date of decree at such rate as it thinks proper.

The rule of damdupat does not apply to interest recoverable in execution of a decree. The reason is that the rule ceases to operate *after* suit (*c*).

The principal of this section applies not only to a suit brought by a creditor, but to a suit for redemption brought by a mortgagor (debtor).

600. Places in which the rule of damdupat applies.—The rule of *damdupat* applies in the Bombay Presidency (*d*). It applies also in the town of Calcutta (*e*), but not in any other part of Bengal (*f*). The rule is not in force in any part of the Madras Presidency (*g*). The rule is applied by section 6 of the Sonthal Parganas Settlement Regulation to money debts in the Sonthal Parganas (*h*).

601. Persons entitled to claim benefit of the rule.—(*1*) According to the Calcutta High Court, the rule of *damdupat* applies only where both the original contracting parties are Hindus (*i*).

(2) According to the Bombay High Court all that is necessary for the application of the rule is that the original *debtor* should be a Hindu. The result is that the rule does not apply if the *original* debtor was a Mahomedan, though the debt might be subsequently transferred to a Hindu (*j*).

The rule does not apply if the original *debtor* was a Mahomedan, though the creditor might be a Hindu (*k*). But the rule does apply if the original debtor was a Hindu, though the creditor might be a Mahomedan (*l*).

(*b*) Code of Civil Procedure, 1908, section 34; *Dhondshet* v. *Rarji* (1898) 22 Bom. 86; *Majmudar Hiralal* v. *Narsilal* (1913) 37 Bom. 326, 338, 40 I. A. 68, 73, 18 I. C. 909, *Achyut* v. *Ramchandra* (1925) 27 Bom. L. R. 492, 87 I. C. 719, ('25) A. B. 362; *Hari Lall, in the matter of* (1906) 33 Cal. 1269, 1276; *Nanda Lal* v. *Dhirendra Nath* (1913) 40 Cal. 710, 21 I.C. 974.

(*c*) *Balkrishna* v. *Gopal* (1875) 1 Bom. 73; *Lall Behary* v. *Thacomoney* (1896) 23 Cal. 899.

(*d*) *Narayan* v. *Satvaji* (1872) 9 Bom. H. C. 83, 85.

(*e*) *Nobin Chunder* v. *Romesh Chunder* (1887) 14 Cal. 781.

(*f*) *Het Narain* v. *Ram Dein* (1883) 9 Cal. 871.

(*g*) *Annaji* v. *Ragubai* (1871) 6 Mad. H. C. 400.

(*h*) *Kunja Behari* v. *Tarapada* (1919) 4 Pat. L. J. 49, 49 I.C. 374, ('19) A.P. 324.

(*i*) *Wooma* v. *Sreebarinath* (1897) 1 C. W. N. (short notes) 178; cf. (1887) 14 Cal. 781, *supra*.

(*j*) *Harilal* v. *Nagar* (1897) 21 Bom. 38.

(*k*) *Nanchand* v. *Bapusaheb* (1879) 3 Bom. 131. See *Dawood* v. *Vullubhdas* (1894) 18 Bom. 227.

(*l*) *Ali Saheb* v. *Shabji* (1897) 21 Bom. 85.

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Where there are two debtors, a Hindu and non-Hindu, the rule applies so far as the Hindu debtor is concerned. But this does not prevent the non-Hindu debtor from claiming contribution from the former on the basis of the actual payment made by him to the creditor (*m*).

When the original debtor is a Hindu, and the interest is allowed to accumulate so that it exceeds the principal, and the debt is then transferred to a Mahomedan, the rule of *damdupat* will apply so long as the debtor was a Hindu, but it will cease to operate from the date the debt was assigned to the Mahomedan (*n*) [ill. (2)].

Illustrations.

(1) A Mahomedan, *M*, borrows Rs. 61 at interest from a Hindu, *X*, and mortgages his property to *X* as a security for the loan. *M* then sells his equity of redemption to a Hindu, *H*. *X* sues *H* to recover Rs. 270, being Rs. 61 for principal and Rs. 209 for interest. *H* contends that he and *X* being Hindus, the rule of *damdupat* applies, and that *X* is not entitled to more than Rs. 61 for interest. The rule of *damdupat* does not apply, for the *original* debtor was a Mahomedan, and *X* is entitled to a decree for Rs. 270: *Harilal* v. *Nagar* (1897) 21 Bom. 38.

(2) A Hindu, *H*, borrows Rs. 150 at interest at the rate of 12 per cent. per annum from a Mahomedan, *X*, on a mortgage of his immoveable property. *H* then sells his equity of redemption to a Mahomedan, *M*. *X* sues *M* to recover Rs. 750, being Rs. 150 for principal and Rs. 600 for interest from the date of the mortgage up to the date of the suit. *X* is entitled to Rs. 300 (*i.e.*, double the principal Rs. 150) *and the interest thereon* at the aforesaid rate from the date of the sale to *M*. If *H* had not sold his equity of redemption to *M*, and the suit had been brought against *H*, *X* would not have been entitled to more than Rs. 300 : *Ali Saheb* v. *Shabji* (1897) 21 Bom. 85.

602. To what transactions the rule applies.—(*1*) The rule of *damdupat* applies not only to unsecured loans, but to loans secured by a pledge of moveable property and those secured by a mortgage of immoveable property (*o*).

(*2*) In the case of a mortgage with possession a distinction has to be made between two classes of cases, namely—

(a) where the amount of the annual rents and profits is fixed beforehand by the parties and it is agreed between the parties that the mortgagee is to receive that amount *in lieu* of interest or a part thereof, irrespective of the *actual* amount of rents that may be recovered by the mortgagee ;

(b) where no such amount is fixed, and there is no such agreement between the parties, so that the mortgagee is under a *liability to account* to the mortgagor for the rents and profits received by him from the mortgaged property.

(*m*) *Maha Mayadasee* v. *Abdur Rahim* (1937) I Cal. 450, 172 I.C. 731, ('37) A. C. 752.

(*n*) See *Ali Saheb* v. *Shabji* (1897) 21 Bom. 85.

(*o*) *Nathubhai* v. *Mulchand* (1868) 5 Bom. H. C. A. C. 196, 198 ; *Narayan* v. *Satvaji* (1872) 9 Bom. H. C. 83.

In the first case no account is to be taken of the rents and profits, and all that has to be done is to ascertain what amount is due to the mortgagee for principal and interest as in the case of a simple loan. To such a case the rule of *damdupat* applies as it does in the case of an ordinary loan (*p*).

In the second case the mortgagee is under a liability to account for the rents and the profits received by him from the mortgaged property, and the rule of *damdupat* does not apply (*q*). "As the mortgagee is to be charged with rents and profits it would not be just to stop his interest and consequently the rule of [*damdupat*] cannot be applied" (*r*).

Illustrations.

(1) *A* borrows Rs. 1,000 from *B* at interest at the rate of 20 per cent. per annum. As a security for the loan *A* mortgages his house to *B* and puts *B* in possession of the house. At the date of the mortgage the house is occupied by *A*'s tenants. It is agreed between *A* and *B* that *B* should receive the rents from the tenants, that the yearly rents should be taken at Rs. 150, and that *A* should pay to *B* every year Rs. 50, being the balance of interest on Rs. 1,000 [Rs. 200 interest - Rs. 150 rent = Rs. 50]. *B* sues *A* to recover Rs. 2,200, being Rs. 1,000 for principal and Rs. 1,200 for interest. Is *B* entitled to recover Rs. 1,200 for interest? No, for as no accounts are to be rendered by *B*, the rule of *damdupat* applies, and *B* is therefore entitled to Rs. 1,000 only for interest. The decree will therefore be for Rs. 1,000 + Rs. 1,000 = Rs. 2,000.

(2) The facts are the same as in ill. (1), except that there is no agreement between *A* and *B* that *B* should take the rents in lieu of interest. In such a case, if *B* sued *A* on the mortgage, *B* would be *liable to account* for the rents received by him and the rule of *damdupat* would not therefore apply. The result is that if it be found on the taking of accounts that the amount due to *B*, after giving credit to *A* for the rents, is Rs. 2,300, *B* will be entitled to a decree for Rs. 2,300, and not merely for Rs. 2,000 as in ill. (1).

603. Mortgages executed after the passing of the Transfer of Property Act, 1882.—It has been held by the High Court of Madras that the rule of *damdupat* does not apply to mortgages executed after the Transfer of Property Act, 1882, came into force (*s*). A different view has been taken by the High Courts of Bombay (*t*) and Calcutta (*u*).

It has been stated above in section 5 that the rule of *damdupat* is not in force in the Madras Presidency. In the case cited above, the High Court of Madras held that even assuming that rule to be in force in the town of Madras, it did not apply to mortgages executed *after* the Transfer of Property Act, 1882, came into force, the reason given being that under sections 86 and 88 of that Act a mortgagee was entitled to the principal and interest in arrears *at the contract rate*, even if it exceeded the principal. Section 86 of that Act provided for a foreclosure decree and section 88 for a decree for sale, and both these sections provided for a decree *inter alia* for what was due to the mortgagee for "principal and *interest* on the mortgage." See now the Code of Civil Procedure, 1908. O. 34, rr. 2 and 4.

(*p*) *Sundrabai* v. *Jayavant* (1900) 24 Bom. 114; *Nathubhai* v. *Mulchand* (1868) 5 Bom. H.C. A. C. 196; *Vithal* v. *Daud* (1869) 6 Bom. H. C. A. C. 90; *Narayan* v. *Satvaji* (1872) 9 Bom. H. C. 83; *Ali Saheb* v. *Shabji* (1897) 21 Bom. 85, 87; *Ganpat* v. *Adarji* (1879) 3 Bom. 312.

(*q*) *Gopal* v. *Gangaram* (1896) 20 Bom. 721 [F.B.]; *Dhondshet* v. *Raoji* (1898) 22 Bom. 86.

(*r*) Per Couch, C. J., in *Nathubhai* v. *Mulchand* (1868) 5 Bom. H. C. A. C. 196, 199.

(*s*) *Madhwa* v. *Venkataramanjula* (1903) 26 Mad. 662.

(*t*) *Jeewanbai* v. *Manordas* (1911) 35 Bom. 199, 8 I. C. 649.

(*u*) *Kunja Lal* v. *Narsamba* (1915) 42 Cal. 826, 31 I.C. 6, ('16) A.C. 542.

CHAPTER XXIX.

BENAMI TRANSACTIONS

Ss. 604, 605

604. Benami transaction.—Where a person buys property with his own money, but in the name of another person or buys property in his own name, but subsequently transfers it into the name of another person, *without any intention in either case to benefit such other person*, the transaction is called "benami", and the person in whose name the transaction is effected is called "benamidar."

Origin of benami transactions.—The word *benami* is a Persian compound word, made up of *be* which means *without* and *nam* which means *name*. It means literally *without a name*, and denotes a transaction effected by a person *without* using his own *name*, but in the name of another. The practice of putting property into a false name, that is, the name of a person other than the real owner, is very common in this country, and it exists as much among Hindus as among Mahomedans (*v*). This practice has arisen partly from superstition—some persons and some names being considered as lucky, and others as unlucky. Partly also the practice is due to a desire to conceal family affairs from public observation. But many transactions originate in fraud; and many of them which did not so originate are made use of for a fraudulent purpose; more especially for the purpose of keeping out creditors who are told when they come to execute a decree, that the property belongs to the fictitious owner, and cannot be seized (*w*).

Benami transactions are not confined solely to *purchases* by one person in the name of another. Thus a person may take a *lease* of property in the name of another, or he may buy property in his own name and subsequently *convey or mortgage* it to another for a fictitious consideration.

Benami transactions among Mahomedans are more commonly known as *furzee.*

TRANSACTIONS

605. Effect given to real title.—Where a transaction is once made out to be benami, effect will be given to the real and not to the nominal title, unless the result of doing so would be—

(i) to violate the provisions of a statute [s. 606 below]; *or*

(ii) to defeat the rights of innocent transferees for value from the benamidar [s. 607 below]; *or*

(iii) the object of the banami transaction was to defraud the creditors of the real owner, and that object has been accomplished [s. 608 below]; *or*

(iv) the transaction is against public policy [s. 609 below].

(*v*) *Moulvie Sayyud* v. *Mussumat Bebee* (1869) 13 M.I.A. 232, 246-247.

(*w*) Markby's "Hindu and Mahomedan Law," p. 103.

S. 605 *Effect given to real title.*—There is no law which *prohibits* benami transactions, in other words, it is not an offence or a crime for *A* to buy property in the name of *B*. Therefore, where *A* has bought property in the name of *B*, and *B* subsequently chooses to say that he is the real owner, it is quite competent to *A* to bring a suit against *B* to establish his title and to recover possession of the property from *B*, and if it is proved that the purchase-money came out of *A*'s funds the Court will pass a decree declaring that *A* is the real owner, and direct *B* to deliver possession of the property to *A* (*x*). Similarly, if property is bought by *A* in *B*'s name, and *C*, a creditor of *A*, subsequently obtains a decree against *A*, it is competent to *C* to show that the property really belong to *A*, and if this fact is proved, the property may be attached and sold to satisfy *C*'s decree (*y*).

Resulting trusts and advancement of wife and children.—It is important to note that the law of benami is in no sense a branch of Hindu law. It is merely an application of the equitable rule that where there is a purchase by *A* in the name of *B*, there is a resulting trust of the whole to *A*. In this respect the general rule of the Indian law, which is laid down in the Indian Trusts Act, 1882, sec. 82, differs but little, if at all, from the general rule of English law on the subject. In both systems of law, the fact to be first determined is *from what source the money came with which the purchase-money was paid.* But in England there is an exception when a purchase is made by a person in the name of his *child* or *wife*, though with his own money. In such a case, the transaction is presumed to have been made by way of advancement or gift to the child or wife, and the burden of proving that there was no advancement or gift lies on the person who so alleges it. But this exception is not recognized in India. In this country, where a purchase is made by a person with his own money—it is *prima facie* assumed to be for his benefit, whether it is made in the name of a child (*z*), wife (*a*), or a stranger, and there is no presumption in favour of an advancement or gift such as there is in the English law. The burden therefore of proving an advancement or gift lies on the person alleging that there was an advancement or gift. In *Gopeekrist* v. *Gungapersaud* (*b*), their Lordships of the Privy Council said: "Benami purchases in the names of children, without any intention of advancement, are frequent in India." But this rule of Indian law applies only to natives of India. It does not apply to transactions where both parties are English, not even if they were born in India (*c*), though the transactions may have taken place in India and the property may be situated in India (*d*). It is the rule of English law that applies to such transactions.

In a Privy Council case (*e*), the question arose whether a purchase of property by a Hindu talukdar in the name of his Mahomedan mistress was a benami transaction or was intended to be a gift to her. Their Lordships held on the evidence that the purchase was a benami transaction. In the course of the judgment their Lordships said: "It [benami transaction] is quite unobjectionable and has a curious resemblance to the doctrine of our English law that the trust of the legal estate results to the man who pays the purchase-money, and this again follows the analogy of our common law that where a feoffment is made without consideration the use results to the feoffor. The exception in our law by way of advancement in favour of wife or child does not apply in India:

(*x*) *Thakrain* v. *Government* (1871) 14 M.I.A. 112.

(*y*) *Musadee Mahomed* v. *Meerza Ally* (1854) 6 M.I.A. 27; *Gopi Wasudeo* v. *Markande* (1879) 3 Bom. 30; *Abdul Hye* v. *Mir Mahomed* (1884) 10 Cal. 616, 11 I.A. 10.

(*z*) *Johnston* v. *Gopal Singh* (1931) 12 Lah. 546, 557, 133 I.C. 628, ('31) A.L. 419; *Gopal* v *Keshoba* (1936) Nag. 65, 165 I.C. 350, ('36) A.N. 185.

(*a*) *Dharani Kant* v. *Kristo Kumari* (1886) 13 I.A. 70, 13 Cal. 181; *Mst. Thakro* v. *Ganga Pershad* (1888) 15 I.A. 29, 10 All. 197.

(*b*) (1854) 6 M.I.A. 53, at p. 79; *Moulvi Sayyud* v. *Mussumat Bebee* (1869) 13 M.I.A. 232, 247; *Bissesur* v. *Luchmessur* (1880) 5 Cal. L.R. 477, 6 I.A. 233 (1886) 13 Cal 181, 13 I.A. 70, *supra* [purchase in *wife's* name]; *Chunder Nath* v. *Kristo Komul* (1871) 15 W.R. 357

(*c*) *Kerwick* v. *Kerwick* (1920) 47 I.A. 275, 48 Cal. 260, 57 I.C. 834, ('21) A.PC. 59 [purchase by husband of land in Rangoon and transferred into wife's name—advancement disproved].

(*d*) *Panton* v. *Administrator General* (1926) 28 Bom. L.R. 11, 93 I.C. 161, ('26) A. Journal 158 [no advancement].

(*e*) *Bilas Kunwar* v. *Desraj* (1915) 42 I.A. 202, 205, 37 All. 557, 564-565, 30 I.C. 299 ('15) A.PC. 96.

S. 605 *Gopeekrist* v. *Gungapersaud* (*f*); but the relationship is a circumstance which is taken into consideration in India in determining whether the transaction is benami or not. The general rule in India in the absence of all other relevant circumstances is thus stated by Lord Campbell in *Dhurm Das Panday* v. *Mussumat Shama Soondri Dibiah* (*g*): *The criterion in these cases in India is to consider from what source the money comes with which the purchase-money is paid.*"

In cases of this kind it is material to enquire who enjoyed the income of the property, whether the real owner or the person in whose name the property was bought. Thus where property was purchased by *A* with his money in the name of *B*, and the question arose whether the purchase was benami as alleged by *A* or intended to be a gift for *B* in return for his services as alleged by *B*, their Lordships of the Privy Council held that evidence of *B*'s possession for nine and a half years without being called on by *A* to account for the rents, and of *B*'s performance of valuable services sufficient to establish a claim on *A*'s generosity, was decisive in favour of a gift (*h*). It is also material in cases of this kind to inquire into the position of the parties and their relation to one another and the motives which could govern their actions. Thus where property was purchased by a Mahomedan lady in her daughter's name and the transfer was impeached by her son after her death as benami, their Lordships held that the resulting inference that it was a benami transaction was rebutted by the evidence of gift, and by the proved intention of the mother to exclude the son with whom she was on hostile terms from inheritance (*i*).

Deposit by husband of his own money in bank in the names of himself and his wife.—The deposit by a Hindu of his own money in a bank in the joint names of himself and wife, and on the terms that it is to be payable to either or the survivor does not on his death constitute a gift by him to his wife. There is a resulting trust in his favour in the absence of proof of a contrary intention, there being in India no presumption of an intended advancement in favour of a wife (*j*).

Burden of proof.—Where *A* purchases property in the name of *B*, and subsequently sues *B* for a declaration that he is the real owner of the property, the burden lies heavily on him to show that he is the real owner. The reason is that what *A* has really to do in such a case is to show that the apparent state of things is not the real state of things, in other words, that the person who appears as the owner on the face of the deed is not the real owner. The Courts should look with jealousy on benami transactions, and they should require from a strict proof of his title before holding that *B* is merely a *benamidar*. And although there may be, with respect to benami transactions, circumstances which might create suspicion and doubt as to the truth of the case of the benamidar, yet the Courts should not decide upon mere suspicion, but upon legal grounds established by evidence (*k*). When evidence on neither side is wholly convincing, and when the evidence given and withheld is open to adverse criticism, the Courts must rely on the surrounding circumstances, the position of the parties and their relation to one another the motives which could govern their actions, and their subsequent conduct (*l*).

Ante-nuptial agreement.—When it is alleged that a purchase of property in India by an Indian out of his own money, but in the name of his wife, was made in pursuance

(*f*) (1854) 6 M.I.A. 53.

(*g*) (1843) 3 M.I.A. 229; *Ram Narain* v. *Muhammad* (1899) 26 I.A. 38, 39, 26 Cal. 227, 230; *De Silva* v. *De Silva* (1903) 5 Bom. L.R. 781; *Motisahu* v. *Purshotum* (1904) 6 Bom. L. R. 975.

(*h*) (1899) 26 I.A. 38, 26 Cal. 227, *supra*.

(*i*) *Ismail* v. *Hafiz Boo* (1906) 33 I.A. 86, 33 Cal. 773.

(*j*) *Guran Ditta* v. *Ram Ditta* (1928) 55 I.A. 235, 55 Cal. 944, 109 I.C. 723, ('28) A.PC. 172; *Shambhunath Shivpuri* v. *Pushkaranath* 71 I.A. 197;

(*k*) *Sreemunchunder* v. *Gopaulchunder* (1866) 11 M.I.A. 28; *Nawab Azimut* v. *Hurdwaree Mul* (1870) 13 M.I.A. 395; *Faez Buksh* v. *Fukeerooden* (1871) 14 M.I.A. 234; *Uman Parshad* v. *Gandharp* (1888) 15 Cal. 20, 14 I.A. 127; *Prince Suleiman* v. *Nawab Mehndi* (1898) 25 Cal. 473, 25 I. A. 15; *Nirmal Chunder* v. *Mahommed* (1899) 26 Cal. 11, 25 I.A. 225.

(*l*) *Dalip Singh* v. *Chaudhrain* (1908) 30 All. 258, 35 I.A. 104; *Sitamma* v. *Sitapathirao* (1938) Mad. 220, 176 I.C. 535, ('38) A.M. 8.

of an ante-nuptial agreement, and that consequently it is not to be regarded as a benami transaction, the alleged ante-nuptial agreement, if oral, must be proved by the clearest and most satisfactory evidence of credible witnesses: it would be unwise to act upon oral evidence, unless there was contemporaneous written evidence to corroborate it (*m*). Ss. 605-607

We now proceed to note the cases in which the Courts have refused to give effect to the real title. They form the subject-matter of the next four sections.

606. Exception I: sale under a decree of Court or for arrears of revenue.—Where a property is sold under a decree of Court or for arrears of revenue, and it is purchased benami and the benamidar is certified to be the purchaser, the real purchaser cannot maintain a suit against the benamidar to establish his title to the property or to recover possession thereof from him. It is so provided by several statutes.

Illustration.

A obtains a decree against *B* for Rs. 5,000. In execution of the decree *B*'s property is sold, and it is purchased by *C* in *D*'s name. *D* then obtains a certificate of sale from the Court. *C* cannot sue *D* for a declaration that he was the real purchaser at the sale. The law is the same where property held by *B* is sold for arrears of revenue payable to Government, and it is bought by *C* in *D*'s name.

See the Code of Civil Procedure, 1908, sec. 66 (*n*); the Bengal Land Revenue Sale Act, 1859, sec. 36; United Provinces Land Revenue Act, 1901, sec. 178; the Madras Revenue Recovery Act, 1864, sec. 38.

The provisions of the above Acts do not affect the rights of *third parties*. Therefore in the case put above it is open to a creditor of *C* to sue *C* and *D* for a declaration that the property belongs to *C*, and that it is liable to satisfy his (*C*'s) creditor's claims (*o*). Nor does the purchase made by a member of a joint Hindu family in his name, but *with funds belonging to the family*, come within the meaning of those Acts. Therefore it is open to the other members of the family to maintain a suit against him for a declaration that the purchase was made on behalf of the family (*p*).

607. Exception II: transfer by benamidar for value.—Where a benamidar sells, mortgages or otherwise transfers for value property held benami by him without the knowledge of the real owner (*q*), the real owner is not entitled to have the transfer set aside, unless the transferee had notice actual or constructive that the transferor was merely a benamidar (*r*).

A buys certain property in the name of *B*. *B* then sells the property to *C*, and misappropriates the purchase-money. *A* sues *B* and *C* to have the sale set aside, alleging that he is the real owner of the property. The sale will not be set aside unless *A* shows that *C* has notice actual or constructive that *B* was not the real owner.

(*m*) *Sura Lakshmiah Chetty* v. *Kothandarama Pillai* (1925) 52 I.A. 286, 48 Mad. 605, 88 I.C. 327, ('25) A. PC. 181.

(*n*) See *Ganga Sahai* v. *Kesri* (1915) 42 I.A. 177, 182, 37 All. 545, 30 I.C. 265, ('15) A. PC. 81.

(*o*) *Kanhizak* v. *Monohur* (1886) 12 Cal. 204, *Saba Bibi* v. *Hara Lal* (1894) 21 Cal. 519

(*p*) *Bodh Singh* v. *Gunesh Chunder* (1874) 12 Beng. L. R. 317 P.C.

(*q*) *Sarju Purshad* v. *Bir Bhaddar* (1893) 20 I.A. 108.

(*r*) *Ramcoomar Koondoo* v. *Mcqueen* (1873) 11 Beng. L.R. 46 I.A. Sup. Vol. 40; *Mir Mahomed Muzuffer* v. *Kishori Mohun* (1895) 22 Cal. 909, 22 I.A. 129.

Ss. 607, 608

Constructive notice.—It is the duty of a purchaser not merely to ascertain in whose name the property stands, but also to ascertain who is in actual possession of the property at the time of the sale to him. If he fails to do so, and it turns out that the real owner, and not the benamidar, was in possession and receipt of the rents of the property, he will be deemed to have constructive notice of the fact that the benamidar was not the real owner. Thus if in the case put above, *A* was in possession, and *C* omitted to enquire as to who was in possession, *A* would be entitled to have the sale set aside (*s*).

Note in this connection the provisions of s. 41 of the Transfer of Property Act, 1882, which run as follows:—"Where, with the consent, express or implied, of the persons interested in immoveable property, a person is the ostensible owner of such property and transfers the same for consideration, the transfer shall not be voidable on the ground that the transferor was not authorized to make it: provided that the transferee, after taking reasonable care to ascertain that the transferor had power to make the transfer, has acted in good faith."

608. Exception III: fraud upon creditors.—Where property has been placed in a false name for the express purpose of defrauding creditors, and that purpose has actually been effected, the real owner is not entitled to recover back the property from the benamidar (*t*). But if the contemplated fraud is not effected, the real owner is entitled to get back the property from the benamidar (*u*).

A, who is indebted to several persons, executes a deed purporting to be a conveyance of his property to *B* for Rs. 30,000. No purchase money is paid by *B* to *A*, and the object of the transaction is to defraud *A*'s creditors. After some time *A* compounds with his creditors and pays them a composition of four annas in the rupee. *A* then sues *B* to recover back the property from *B*. Here the object of the fraud is effected, and the maxim applies, "*In pari delicto potior est conditio possedentis*," that is to say "in equal fault the condition of the possessor is the more favourable." Both *A* and *B* are *equally guilty* of a confederacy to defraud *A*'s creditors; but the *possession* being in *B*, the Court will not disturb him in his possession. In such a case the Court will say "Let the estate lie where it falls." But if *A* sues *B* to recover the property *before* the contemplated fraud is committed, the Court will not punish *A* merely because he at one time intended to defraud his creditors, and it will direct *B* to deliver the property to *A*. Where the purpose of the fraud is not effected, there is nothing to prevent the real owner from repudiating the entire transaction, removing all authority of his confederate to carry out the fraudulent scheme and recovering possession of the property (*v*).

Note in this connection the provisions of s. 84 of the Indian Trusts Act, 1882, which run as follows:—"Where the owner of property transfers it to another for an illegal purpose and such purpose is not carried into execution . . . the transferee must hold the property for the benefit of the transferor." [Note—To transfer property for the purpose of defrauding creditors is to transfer it for an illegal purpose within the meaning of s. 84 of the Trust Act.]

(*s*) *Mancharji* v. *Kongseoo* (1869) 6 Bom. H.C. O.C. 59; *Vyunkatacharya* v. *Yamanasami* (1911) 35 Bom. 269, 10 I. C. 817; *Imambandi* v. *Kumleswari* (1887) 14 Cal. 109, 117, 13 I. A. 160, 165.

(*t*) *Nawab Singh* v. *Daljit Singh* (1936) 58 All. 842, 162 I.C. 958, ('36) A.A. 401.

(*u*) *Petherpermal* v. *Muniandi* (1908) 35 I.A. 98; *Honapa* v. *Narsapa* (1899) 23 Bom. 406; *Raghavalu* v. *Adinarayana* (1909) 32 Mad. 323, 2 I. C. 616; *Jadu Nath* v. *Rup Lal* (1906) 33 Cal. 967; *Girdharlal* v. *Manikamma* (1914) 38 Bom. 10, 20 I. C. 50, ('14) A. B. 283.

(*v*) (1908) 35 I.A. 98, 103, *supra*.

Ss. 608-611

Collusive decree.—Where a collusive decree is obtained by a benamidar against the real owner with the object of defrauding the latter's creditors, the decree is binding on the real owner even if no creditor has been defrauded. The reason is that *where a person has suffered judgment to pass against him, the matter is then placed beyond his control.* *A* buys a house in *B*'s name with the object of protecting the property against the claims of his creditors, and occupies it as *B*'s tenant. Subsequently *B* in collusion with *A* sues *A* to recover possession of the house from him, and obtains a decree *ex parte* against *A*. *A* cannot impeach the decree on the ground that the object of the decree was to defraud his creditors. The result is that if *B* applies for execution of the decree the Court will order *A* to deliver possession of the property to *B* (*w*). But the decree may be challenged by *A*'s creditors (*x*).

609. Exception IV: transaction against public policy.—Where a purchase of property, which if made by a person in his own name, would be illegal, as being opposed to public policy, is made by him in the name of another person, the real purchaser is not entitled to recover the property from the benamidar (*y*).

In the case cited above, the Kanungo of a district, who was prohibited on penalty of dismissal from office from acquiring property in his own district, purchased property in the name of his brother's son. After the Kanungo's death his heirs sued his brother's son for recovery of the property. It was held that they were not entitled to recover the property.

610. Decree against benamidar.—In the absence of any evidence to the contrary, it is to be presumed that a suit instituted by the benamidar has been instituted by him with the full authority of the real owner, and any decision come to in the suit is as much binding upon the real owner as if the suit had been brought by the real owner himself (*z*).

Illustration.

A buys a house benami in *B*'s name. *C* is in possession of the house at the date of purchase. *B* sues *C* to recover possession of the house, but the suit is dismissed. *A* alleging that he is the real owner, and that *B* was negligent in the conduct of the suit against *C*, sues *C* to recover possession. The Court finds that the suit by *B* against *C* was instituted with the knowledge of *A*. *A* is, therefore, bound by the decree in that suit as if he himself had instituted the suit, and the suit is barred as *res judicata* : *Shamgara* v. *Krishnan* (1892) 15 Mad. 267.

611. Right of benamidar to sue.—A benamidar fully represents the true owner, and so far as the outside world is concerned can maintain all suits whether arising out of contract or out of title to immoveable property (*a*).

(*w*) *Chennirappa* v. *Puttappa* (1887) 11 Bom. 708; *Venkatramanna* v. *Viramma* (1887) 10 Mad. 17.

(*x*) *Gopi* v. *Markande* (1879) 3 Bom. 30.

(*y*) *Sheo Narain* v. *Mata Prasad* (1905) 27 All. 73.

(*z*) *Gopi Nath* v. *Bhugwat* (1884) 10 Cal. 697, 705; *Shangara* v. *Krishnan* (1892) 15 Mad. 267; *Baroda Kanta* v. *Chunder Kanta* (1902) 29 Cal. 682; *Kaniz* v. *Wali Ullah* (1908) 30 All. 30; *Ravji* v. *Mahadev* (1898) 22 Bom. 672.

(*a*) *Gur Narayan* v. *Sheo Lal Singh* (1919) 46 I. A. 1, 46, Cal. 556, 49 I. C. 1, ('18) A. PC. 140 [benami purchase]; *Vaitheswara* v. *Srinivasa* (1919) 42 Mad. 348, 50 I.C. 309. ('19) A.M. 524 [benami mortgage], [F.B.].

S. 611 *Suits arising out of contract.*—A benamidar can maintain a suit on a contract entered into in his name. Thus if *A* lends money to *B* on a mortgage of *B*'s property and the mortgage is taken in *C*'s name, *C* may sue *B* on the mortgage in his own name (*b*). Similarly if *A* lends money to *B* on a promissory note, but the note is taken in *C*'s name, *C* is the proper person to sue upon it (*c*). *A* can sue *B* only if he ensures that *B* is protected from further liability to *C*. This object is attained if *C* is made a party to the suit, appears in Court and states that he does not claim on the note (*d*).

As regards suits for recovery of land upon title, there was a conflict of decisions. On the one hand, it was held by the High Courts of Calcutta (*e*) and Madras (*f*), that a benamidar, as such, was not entitled to maintain a suit in his name for possession of land of which he was merely a benamidar. On the other hand, it was held by the High Courts of Allahabad (*g*) and Bombay (*h*), that he was entitled to maintain such suit. In a recent case the Judicial Committee held that a benamidar *can sue in his own name* to recover immoveable property vested in him as benamidar. He has the title and right of possession which the real owner has given him, which is apparently enough to support the suit (*i*).

Illustration.

A purchases a house benami in *B*'s name. At the date of the purchase *C* is in possession of the house. *B* sues *C* for possession of the house. The defence is that *B* is not the real owner. *B*, though a mere benamidar, is entitled to maintain the suit. It is open to *A* to apply to be joined in the suit. It is also open to *C* to apply to have *A* joined in the suit.

(*b*) *Bhola* v. *Ram Lall* (1897) 24 Cal. 34 ; *Sachitananda* v. *Baloram* (1897) 24 Cal. 644 [suit for foreclosure] ; *Yad Ram* v. *Umrao Singh* (1899) 21 All. 380 ; *Kamta Prasad* v. *Indomati* (1915) 37 All. 414, 417-418, 29 I. C. 593, ('15) A. A. 264.

(*c*) *Ramanuja* v. *Sadagopa* (1905) 28 Mad. 205 ; *Subba Narayana* v. *Ramaswami* (1907) 30 Mad. 88, on app. from 28 Mad. 244.

(*d*) *Sree Krishna Jana* v. *Seeta Nath Bera* (1938) 1 Cal. 450, ('37) A. C. 753.

(*e*) *Hari Govind* v. *Akoy Kumar* (1889) 16 Cal. 364 ; *Issur Chandra* v. *Gopal Chandra* (1898) 25 Cal. 98 ; *Baroda Sundari* v. *Dino Bandhu* (1898) 25 Cal. 874 ; *Mohendra Nath* v. *Kali Proshad* (1903) 30 Cal. 265 ; *Atrabannesa* v. *Safatullah* (1916) 43 Cal. 504, 31 I.C. 189, ('16) A.C. 645 [suit for partition].

(*f*) *Kuthaperumal* v. *The Secretary of State for India* (1907) 30 Mad. 245.

(*g*) *Nand Kishore* v. *Ahmad Ata* (1896) 18 All. 69, (1899) 21 All. 380, *supra* ; *Bachcha* v. *Gajadhar Lal* (1906) 28 All. 44.

(*h*) *Ravji* v. *Mahadev* (1898) 22 Bom. 672 ; *Dagdu* v. *Balvant* (1898) 22 Bom. 820.

(*i*) *Gur Narain* v. *Sheo Lal Singh* (1919) 46 I. A. 1, 46 Cal. 566, 49 I. C. 1, ('18) A. C. 140.

CHAPTER XXX.

JAINS.

1. *Jain tenets and Jain law.*

612. Jains and their tenets.—The Jains seem to have originated in the sixth, or seventh century; to have become conspicuous in the eight or ninth century: got to the highest prosperity in the eleventh and declined after the twelfth. Their principal seats seem to have been in the southern parts of India, in Gujarat and the west of India, *e.g.*, Mewar and Marwar. They seem never to have had much success in the provinces on the Ganges. They are still very numerous, especially in Gujarat, the Rajput country and Canara. **S. 612**

The chief objects of their worship are the idols of a limited number of saints who have raised themselves by austerities to a superiority over the gods, and which exactly resemble those of Buddha in appearance and general character but are entirely distinct from them in their names and individual histories. As regards religion, they hold an intermediate place between the followers of Buddha and Brahma. They reject the scriptural character of the Vedas, and repudiate the Brahminical doctrines relating to obsequial ceremonies, the performance of *shradh*, and the offering of oblations for the salvation of the soul of the deceased. Amongst them there is no belief that a son, either by birth or adoption, confers spiritual benefit on the father. They also differ from the Brahminical Hindus in their conduct towards the dead, omitting all obsequies after the corpse is burnt or buried (*j*). There are, however, among them castes which still observe Hindu customs, and perform the monthly, six-monthly and anniversary ceremonies of the dead. In cases such as these the right to perform the ceremonies is governed by the ordinary Hindu law, that is to say, the son of the deceased has the preferential right to perform the ceremonies, and if there be no son (which term includes grandson and great-grandson), it is the duty of the widow to get them performed provided the husband was divided at his death and the widow succeeds to his estate as his heir (*k*).

The Jains agree with the Hindus in other points such as division into castes. This exists in full force in the south and

(*j*) *Bhagvandas* v. *Rajmal* (1873) 10 Bom. H. C. 241, 246-249.

(*k*) *Sundarji* v. *Dahibai* (1905) 29 Bom. 316.

Ss. 612, 613

west of India, and can only be said to be dormant in the north-east. A Jain converted into orthodox faith returns to the caste from which he traced his first descent (*l*). Jains are mostly of Vaishya origin and they themselves have numerous divisions of their own of which the principal ones are (1) Pramer, (2) Oswal, (3) Agarwal and (4) Khandewal (*m*).

In *Gettappa* v. *Eramma* (*n*) where the question was whether a Jain widow was competent to adopt a son to her husband without his authority Kumaraswami Sastri, Ag. C.J., said: "Were the matters rest integra, I would be inclined to hold that modern research has shown that the Jains are not Hindu dissenters but that Jainism has an origin and history long anterior to the Smritis and commentaries which are recognised authorities on Hindu law and usage. In fact Maha Veera, the last of the Jain Theerthankaras, was a contemporary of Buddha and died about 527 B.C. The Jain religion refers to a number of previous Theerthankaras and there can be little doubt that Jainism as a distinct religion was flourishing several centuries before Christ. In fact Jainism rejects the authority of the Vedas which form the bedrock of Hinduism and denies the efficacy of the various ceremonies which Hindus consider essential. So far as Jain law is concerned it has its own law-books of which Bhadrabahu Samhita is an important one. Vardhaimana Niti and Ashana Niti by the great Jain teacher Hemachandra deal also with Jain law. No doubt, by long association with Hindus who form the bulk of the population, Jainism has assimilated several of the customs and ceremonial practices of the Hindus but this is no ground for applying the Hindu law as developed by Vijnaneshwara and other commentators, several centuries after Jainism was a distinct and separate religion with its own religious ceremonial and legal systems, en bloc to Jains and throwing on them the onus of showing that they are not bound by the law as laid down by Jain law-givers. It seems to me that in considering questions of Jain law relating to adoption, succession and partition we have to see what the law as expounded by Jain law-givers is and to throw the onus on those who assert that in any particular matter the Jains have adopted Hindu law and custom and have not followed the law as laid down by their own law-givers." See, however, sec. 613.

613. Jain Law.—The ordinary Hindu law is to be applied to Jains, in the absence of proof of special customs and usages varying that law. Those customs and usages must be proved by evidence, as other special customs and usages varying the general law should be proved (ss. 16-20), and in the absence of proof the ordinary law must prevail (*o*). There is, however, nothing to limit the scope of the inquiry to the particular locality in which the persons setting up the custom reside. Judicial decisions recognising the existence of a disputed custom among the Jains of one place are relevant as evidence of the existence of the same custom amongst the Jains of

(*l*) *Ambabai* v. *Govind* (1899) 23 Bom. 257.

(*m*) *Ambabai* v. *Govind*, *supra*.

(*n*) (1927) 50 Mad. 228, 229-230, 90 I.C. 503, ('27) A.M. 228.

(*o*) *Chotay Lall* v. *Chunnu Lall* (1879) 6 I.A. 15, 22 W.R. 496, *Sheo Singh Rai* v. *Mussumut Dakho* (1878) 5 I.A. 87, 1 All. 688; *Lala Rup Chand* v. *Jambu Parshad* (1910) 37 I.A. 93, 103-104, 32 All. 247, 6 I.C. 272; *Bulakan* v. *Ratan Lal* (1928) 26 All. L.J. 1196, 110 I.C. 546, ('28) A.A. 656 (1927) 50 Mad. 228, 99 I.C. 503, ('27) A.M. 228, *supra*; *Jaiwanti* v. *Anandi Devi* (1938) All. 196, 173 I.C. 356, ('38) A. A. 62.

another place, unless it is shown that the customs are different ; and oral evidence of the same kind is equally admissible (*p*). Where, however, a custom is negatived by a judicial decision in one place, *e.g.*, Madras, the fact that among Jains in the other Presidencies such a custom has been upheld by Courts does not warrant a general presumption of the prevalence of the custom in the Madras Presidency (*q*). **Ss. 613-616**

614. Jain law in Bombay Presidency.—In *Bhagwandas* v. *Rajmal* (*r*), Westropp, C. J., said : "Hitherto, so far as we can discover, none but ordinary Hindu law has been ever administered either in this Island or in this Presidency to persons of the Jain sect."

2. *Succession.*

615. Law of succession.—Until a special custom to the contrary is established, the ordinary Hindu law governs succession amongst the Jains. The ordinary Hindu law is that of the three superior castes (*s*).

616. Interest taken by Jain widow in her husband's estate.—In the absence of a custom to the contrary, a Jain widow takes a limited interest in her husband's estate similar to the "widow's estate." A custom, however, to the contrary has been proved in several cases, and it has been held in cases from Meerut (*t*), Saharanpur (*u*), and Arrah in the district of Shahabad (*v*), that amongst Agarwala Jains the widow takes an absolute estate in the self-acquired property of her husband, and that she has full power of alienation in respect of such property. But there is no custom which entitles her to an absolute estate in ancestral property left by her husband. In the latter case she takes only a widow's estate (*w*).

In Bombay it has been held that there is no custom among the Dasha Shrimali Shwetambar Jains of Khandesh under which a widow takes an absolute interest in her husband's

(*p*) *Harnabh Pershad* v. *Mandil Dass* (1900) 27 Cal. 379, 391.

(*q*) *Gettappa* v. *Eramma* (1927) 50 Mad. 228, 237-238, 99 I.C. 503, ('27) A.M. 228.

(*r*) (1873) 10 Bom. H.C. 241, 256 ; *Amava* v. *Mahadgauda* (1898) 22 Bom. 416.

(*s*) *Ambabai* v. *Govind* (1899) 23 Bom. 257 ; *Mt. Lado* v. *Banarsi Das* (1933) 14 Lah. 95 139 I.C. 721, ('32) A.L. 546 [case from Delhi].

(*t*) *Sheo Singh Rai* v. *Mussumut Dakho* (1878) 5 I.A. 87, 1 All. 688.

(*u*) *Shimbhu Nath* v. *Gayan Chand* (1894) 16 All. 379.

(*v*) (1900) 27 Cal. 379, *supra*.

(*w*) *Punhar Singh* v. *Shamsher Jang* (1931) 29 All. L.J. 314, 133 I.C. 785, ('31) A.A. 695; *Nekram Singh* v. *Srinivas* (1926) 24 All. L.J. 751, 96 I.C. 639, ('26) A.A. 586.

Ss. 616-620

estate or a mother in her son's estate (*x*). These females in that community take only a "woman's estate."

616A. Succession to stridhana.—According to the custom and usages of the Agarwala community, the son is entitled to succeed to his mother's stridhana (*y*).

3. *Adoption.*

617. Adoption secular in character.– The Agarwala Jains do not believe that a son whether by birth or adoption, confers any spiritual benefit on the father; the adoption, therefore, is entirely secular in character (*z*).

618. Adoption by widow.—Amongst the Agarwala Banias of the Sarogi sect a sonless widow may by custom adopt without the permission of her husband or the consent of her husband's sapindas (*a*). If the family is joint, he becomes a coparcener (s.472) (*b*). There is no such custom in the Madras Presidency (*c*). A Jain widow in Bombay can adopt without the husband's authority (*d*).

619. Second adoption by widow.—As under the Hindu law, so among Jains, a Jain widow has power after the death of an adopted son to make a second adoption (*e*).

620. Age of boy to be adopted: adoption of married man.– The Agarwala Jains belong to the twice-born classes, and by the general Hindu law applicable thereto a boy cannot be adopted after his marriage, except in the case of persons governed by special custom duly proved. In a case from Saharanpur it was held by the Courts in India, that according to the custom of which evidence was given in the case there was no restriction of *age or marriage,* and that a married man could be adopted. This decision was confirmed by the Privy Council on appeal, but their Lordships observed that having regard to the fact that the custom alleged

(*x*) *Bhikabai* v. *Manilal* (1930) 54 Bom. 780, 128 I.C. 628, ('30) A.B. 517.

(*y*) *Hariram* v. *Madan Gopal* (1928) 33 C.W.N. 493, 114 I.C. 565, ('29) A.PC. 77.

(*z*) *Dhanraj* v. *Soni Bai* (1925) 52 I.A. 231, 242, 52 Cal. 482, 87 I.C. 357, ('25) A.PC. 118 [a case from Amraoti in the C.P.].

(*a*) *Sheo Singh Rai* v. *Mussamut Dakho* (1878) 5 I.A. 87, 1 All. 688; *Manek Chand* v. *Jagat Settani* (1890) 17 Cal. 518; *Lakhmi Chand* v. *Gatto Bai* (1886) 8 All. 319; *Harnabh Pershad* v. *Mandil Dass* (1900) 27 Cal. 397; *Manohar Lal* v. *Banarsi Das* (1907) 29 All. 495, *Asharfi* v. *Rup Chand* (1908) 30 All. 197; *Banarsi Das* v. *Sumat Prasad* (1936) 58 All. 1019, 164 I. C. 1047, ('36) A. A. 641.

(*b*) *Sundar Lal* v. *Baldeo Singh* (1933) 14 Lah. 78, 138 I.C. 151, ('32) A.L. 426.

(*c*) *Peria Ammani* v. *Krishna Sami* (1893) 16 Mad. 182; *Gelappa* v. *Eramma* (1927) 50 Mad. 228, 99 I.C. 503, ('27) A.M. 228.

(*d*) *Yamashetti Bhaushetti* v. *Ashok Bhau Shetti* (1940) Bom. 819, 191 I.C. 488, ('40) A.B. 391; *Suganchand Bhikamchand* v. *Mangibai Gulabchand* (1942) Bom. 467, 201 I.C. 759, ('42) A.B. 185.

(*e*) (1886) 8 All. 319, *supra*.

was very wide and the evidence was limited to a comparatively small number of centres of Jain population, the case should not be taken as a satisfactory precedent if in any future instance further evidence regarding the alleged custom should be forthcoming (*f*). In a later case (*g*), it was held by the Privy Council that in the Sitambari sect of Jains the adopted son may at the time of his adoption be a grown up and married man. The High Court of Allahabad has also held that among Jains a married man may lawfully be adopted (*h*). In *Dhanraj* v. *Sonibai* (*i*) the parties belonged to the caste or sect of Agarwalas, who, as their Lordships of the Privy Council observed, generally adhere to Jainism and repudiate the Brahminical doctrines as to obsequial ceremonies, shraddhas and offerings of oblations for the salvation of the soul of the deceased, and do not believe that a son either by birth or by adoption confers spiritual benefit on the father. Their Lordships further observed that among these people the qualifying age of adoption extends to the thirty-second year.

621. Adoption of orphan.—Under the Hindu law it is essential to the validity of an adoption that the child should be "given" to the adopter by the father, or if he be dead, by the mother. No other person has this right, nor can such right be delegated to any other person. Consequently a boy who has lost both his parents cannot be adopted. This rule applies also to the Agarwala Banias of the Sarogi sect (*j*).

In a Bombay case where the question arose whether there was a custom of adopting an orphan among Jains in Western India, it was held that the evidence given in the case was sufficient as between the parties to the suit and those claiming through and under them to entitle the Court to say that there was such a custom (*k*).

622. Adoption of daughter's son.—A daughter's son may be adopted amongst the Agarwala Banias of the Sarogi sect (*l*).

623. Adoption of sister's son.—Under Jain law the adoption of a sister's son is valid (*m*).

(*f*) *Lala Rup Chand* v. *Jambu Parsad* (1910) 37 I. A. 93, 32 All. 247, 6 I.C. 272.

(*g*) *Sheokuarbai* v. *Jeoraj* (1920) 25 C.W.N. 273 [P.C.], 61 I.C. 481, ('21) A.PC. 77.

(*h*) *Manohar Lal* v. *Benarsi Das* (1907) 29 All. 495.

(*i*) *Dhanraj* v. *Soni Bai* (1925) 52 I.A. 231, 242, 52 Cal. 482, 87 I.C. 357, ('25) A.PC. 118 [a case from Amraoti in the C.P.].

(*j*) (1925) 52 I A. 231, 236, 52 Cal 482, 87 I. C. 357, ('25) A. PC. 118, *supra*; *Bhagvandas* v. *Rajmal* (1873) 10 Bom. H. C. 241.

(*k*) *Purshottam* v. *Venichand* (1921) 45 Bom. 754, 61 I.C. 192, ('21) A.B. 147.

(*l*) *Sheo Singh Rai* v. *Mussumut Dakho* (1878) 5 I.A. 87, 1 All. 688.

(*m*) *Hassan Ali* v. *Naga Mal* (1876) 1 All. 288.

Ss. 624, 625

624. Ceremonies incidental to adoption.—Among Agarwala Jains the only ceremony necessary for an adoption is the giving and receiving of the boy in adoption. It is not necessary that the boy should be placed on the lap of the widow (*n*).

Among Agarwala Banias of the Sarogi sect the practice has been at the time of adoption to tie a turban round the head of the boy who is being adopted in the presence of the principal men of the community (the punchas) and give them a feast (*o*).

Amongst the Agarwala Banias of Zira (in the Punjab), the general rules of Hindu law as to adoption do not apply, and by the custom applicable to them an unequivocal declaration by the adopted father that a boy has been adopted and the subsequent treatment of that boy as the adopted son is sufficient to constitute a valid adoption (*p*).

625. Share of adopted son.—As amongst orthodox Hindus so among Jains an adopted son is entitled in the Bombay Presidency to one-fourth of the estate of the adoptive father if a natural son is born after the adoption (*q*).

(*n*) (1920) 25 C.W.N. 273, 61 I.C. 481 ('21) A PC. 77, *supra*; (1925) 52 I.A 231, 52 Cal. 482, 87 I.C. 357, ('25) A.PC. 118, *supra*.

(*o*) *Dhanraj* v. *Soni Bai* (1925) 52 I.A. 231, 52 Cal. 482, 87 I.C. 357, ('25) A PC. 118.

(*p*) *Chaman Lal* v. *Hari Chand* (1913) 10 I A. 156, 40 Cal. 879, 19 I C. 669.

(*q*) *Rukhab* v. *Chunilal* (1892) 16 Bom. 347.

CHAPTER XXXI.

SUDRAS.

626. Who are Sudras.—The Hindus are divided into two main divisions, namely, (1) the regenerate castes, and (2) the Sudras. Legally Sudra merely denotes one of the two main genera among Hindus. In *Subrao* v. *Radha* (*r*), Madgavkar, J., observed as follows: "The Sanskrit texts which lay down certain functions and duties of the four main castes in Hindu society as it might have existed many centuries ago, are not applicable to the present when function and legal caste do not coincide.... The origin of caste is likewise not very relevant. It is generally agreed that castes arose, partly from the division of classes and functions and partly from the contest between the fairer Aryan with the darker Dravidian, as is sufficiently proved by the Sanskrit word *varna* or colour of caste. But colour, no more than function, is a test of caste, the Sudra of the North being often fairer than the Brahmin of the South. The tendency of occupation to be hereditary in a society which ceased to progress and the crystallization of the idea of caste and its abnormal growth over a large area such as India, are matters of sociological interest but throw little legal light on the question in issue. Even at the present day, the principle that caste springs from birth and cannot be changed is not unchallenged by ethnologists, who point out that miscegenation and the absorption of the aboriginal inhabitants into Hinduism have existed for centuries and have not stopped. This process has also been recognised by the Courts. It suffices to refer to recent cases such as *Sahdeo Narain Deo* v. *Kusum Kumari* (*s*) where such a process of absorption including the custom of adoption barely a century old was recognised by their Lordships of the Privy Council." S. 626

In a Calcutta case (*t*), the question was whether Kayesthas were of the Sudra caste and the Court applied four tests, (1) wearing the sacred thread; (2) ability to perform the homa; (3) the rule as to the period of impurity; and (4) the rule as to the incompetence of illegitimate sons to inheritance. By the application of these tests the Courts came to the conclusion

(*r*) (1928) 52 Bom. 497, 501, ('28) A. B. 295.
(*s*) (1923) 50 I.A. 58, 2 Pat. 230, 71 I.C. 769, ('23) A.PC. 21.
(*t*) *Rajcoomar Lall* v. *Bissessur Dyal* (1884) 10 Cal. 688, 695.

Ss. 626, 627

that the Kayesthas were Hindus of the Sudra caste. In a Patna case (*u*), on the other hand, it was held that the mere non-observance of the orthodox practices could not take away the rights of a Kayestha in matters of inheritance, marriage and adoption and that the Kayesthas of Bihar belonged to the twice-born classes.

In *Maharaja of Kolhapur* v. *Sundaram Ayyar* (*v*) the Court accepted the principle that the consciousness of a community is a good test of caste. This accords with the view of Dr. Sarvadhikari (*w*) who says that "the only safe rule to follow in all cases where the determination of the caste of a person is in question, is to ascertain the customs and usages by which the social conduct of the person given is regulated. The remarriage of widows, and equal rights and privileges of legitimate and illegitimate sons, and similar customs and usages, are marks by which a Sudra can be distinguished." In the Bombay case referred to above, Madgavker, J., said: "The popular view lays down three tests: (1) the consciousness of the caste, (2) its customs and (3) the acceptance of that consciousness by the other castes." After referring to the above tests the learned judge said as follows: "Speaking for myself, I confess, therefore, that I am unable to discover any authoritative principle or test or text which could be applied to decide the present question. The difficulty is so great as perhaps to justify a doubt if the ordinary Courts of law are fitted to decide such questions, unless the Legislature is prepared to lay down general rules for application in cases such as the present. But failing such a principle or rule, the Courts, it seems to me, have at present necessarily to fall back upon the only possible test remaining, namely, the test of custom—a test not inconsistent either with the spirit of Hindu Jurisprudence, which itself lays down that custom is even more powerful than the Shastras or with the view of the British Courts on important matters such as succession, primogeniture and impartibility" (*x*).

627. Lingayats.—The Lingayats who are originally Hindus are a body of dissenters and the founder of their religion was one Basava who was born about 1100 A.D. They

(*u*) *Ishwari Prasad* v. *Rai Hari Prasad* (1927) 6 Pat. 506; 106 I.C. 620, ('27) A.P. 145.

(*v*) (1925) 48 Mad. 1, 52, 93 I. C. 705, ('25) A.M. 497.

(*w*) Tagore Law Lectures (1880), 2nd Ed., p.830.

(*x*) *Subrao* v. *Radha* (1928) 52 Bom. 497, 502, 113 I. C. 497, ('28) A.B. 295.

acknowledge only one God, Siva, and reject the other two persons of the Hindu Triad. They revere the Vedas, but disregard the later commentaries on which the Brahmans rely. Their faith purports to be the primitive Hindu faith, cleared of all priestly mysticisms. They deny the supremacy of Brahmans, and pretend to be free from caste distinctions, though at the present day caste is in fact observed amongst them. They declare that there is no need for sacrifices, penances, pilgrimages or fasts. The cardinal principle of the faith is an unquestioning belief in the efficacy of the Lingam, the Image which has always been regarded as symbolical of the God Siva. Mysore, the Southern Mahratta country, and the Bellary District contain most of these Lingayats. Though the sacred thread is not worn by the Lingayats, a ceremony called Deeksha ought to be performed about their eighth year but as in the case of Upanayanam it is often performed much later. The sacred Mantra is whispered in the ear by their Guru and this ceremony corresponds to Upanayanam among the Brahmans.

In the case of Jains it is undoubted law that in the absence of any custom to the contrary which has to be set up and proved, they are subject to the rules of Hindu law. The Jains do not worship Siva nor do they recognise the authority of the Vedas. But in the case of Lingayats whose only God is Siva and who acknowledge the authority of the Vedas, they are all the more bound by Hindu law except in so far as it is modified by custom (*y*).

In the Madras case cited above the Lingayats of Madras were apparently not regarded as Sudras. In Bombay, however, it has been held that the Lingayats of the Bombay Presidency are Sudras, and not Vaishyas (*z*).

628. Kayesthas.— The Kayesthas of Bengal are Sudras (*a*). As regards Kayesthas of Bihar it has been held that they belong to the three regenerate classes, and are not Sudras (*b*).

(*y*) *Somasekhara* v. *Mahadeva* (1930) 53 Mad. 297, 303-305, 130 I.C. 744, ('30) A. M. 496.

(*z*) *Gopal* v. *Hanmant* (1879) 3 Bom. 273; *Fakirgouda* v. *Gangi* (1898) 22 Bom. 277.

(*a*) *Asita Mohan* v. *Nirode Mohan* (1916) 20 C. W. N. 901, 904, 35 I. C. 127, ('17) A.C. 292; *Biswanath* v. *Shorashibala* (1921) 48 Cal. 926, 934, 66 I. C. 590, ('21) A. C. 48; *Bhola Nath* v. *Emperor* (1924) 51 Cal. 488, 492-493 81 I. C. 709, ('24) A. C. 616.

(*b*) *Ishwari Prasad* v. *Rai Hari Prasad* (1926) 6 Pat. 506, 106 I. C. 620, ('27) A. P. 145; *Rajendra* v. *Gopal* (1928) 7 Pat. 245, 108 I. C. 545, ('29) A. P. 51.

Ss. 629-634

629. Rajas of Tanjore.—The Tanjore branch of the Marathas descended from Sivaji are Sudras, and not Kshatriyas (*c*).

630. Marathas of Bombay Presidency.—There are three classes among the Marathas in the Bombay Presidency, namely, (1) the five families, (2) the ninety-six families, and (3) the rest. Of these first two classes are Kshatriyas; the last class consists of Sudras (*d*).

631. Converts to Hinduism.—Converts to Hinduism are regarded as Sudras (*e*).

632. Whether a Sudra can be a Sanyasi.—A Sudra cannot enter the order of *Yati* or *Sanyasi* (ascetic). Hence a Sudra, though he has renounced the world and purports to lead the life of an ascetic, is entitled to inherit to his relations, and on his death his estate will pass to his natural (as distinguished from religious) heirs (*f*).

Ceremonies incidental to adoption.

633. Ceremonies incidental to adoption.—(1) Adoption amongst Sudras is a purely secular transaction, and no ceremonies are necessary in addition to the giving and taking the boy in adoption. The giving and taking ceremony, however, is absolutely necessary for the validity of an adoption (*g*). (2) Amongst Maratha Brahmins in Bombay, where the boy to be adopted is of the same gotra as the adoptive father, the performance of the ceremony of *datta homam* is not essential to the validity of an adoption (*h*).

634. Who may adopt:—

(*1*) *Adoption by leper.*—No ceremonies being necessary for an adoption among Sudras, even a leper may adopt (*i*).

(*2*) *Adoption by woman under pollution and adoption by unchaste woman.*—No ceremonies being necessary for an adoption among Sudras, a woman under pollution may adopt (*j*). So also an unchaste woman (*k*).

(*c*) *Maharaja of Kolhapur* v. *Sundaram* (1925) 48 Mad. 1, 93 I. C. 705, ('25) A. M. 497.

(*d*) *Subrao* v. *Radha* (1928) 52 Bom. 497, 113 I. C. 497, ('28) A. B. 295.

(*e*) *Muthusami* v. *Masilamani* (1910) 33 Mad. 342, 5 I. C. 42.

(*f*) *Dharmapuram* v. *Virapandiyam* (1899) 22 Mad. 302; *Harish Chandra* v. *Atir Mahomed* (1913) 40 Cal. 545, 18 I. C. 474; *Somasundaram* v. *Vaithilinga* (1917) 40 Mad. 846, 41 I. C. 546, ('18) A. M. 794.

(*g*) *Indromoni* v. *Behari Lal* (1879) 7 I. A. 24, 5 Cal. 770; *Mahashoya* v. *Srimati Krishna* (1880) 7 I. A. 250, 6 Cal. 381; *Asita Mohon* v. *Nirode Mohon* (1916) 20 C. W. N. 901, 35 I. C. 127, ('17) A. C. 292; *Bhala* v. *Parbhu Hari* (1878) 2 Bom. 67.

(*h*) *Bal Gangadhar Tilak* v. *Srinivas* (1915) 42 I. A. 135, 39 Bom. 441, 29 I. C. 639, ('15) A. PC. 7.

(*i*) *Sukumari* v. *Ananta* (1901), 28 Cal. 168.

(*j*) *Thangathani* v. *Ramu* (1882) 5 Mad. 389.

(*k*) *Basvant* v. *Mallappa* (1921) 45 Bom. 459, 55 I. C. 800, ('21) A. B. 301.

635. Who may be adopted:— Ss. 635-638

(1) *Adoption of daughter's son, sister's son, sister's grandson, and mother's sister's son.*—Among Sudras the adoption of a daughter's son, sister's son (*l*), sister's grandson (*m*), and mother's sister's son (*n*), is valid.

(2) *Adoption of boy of different Gotra.*—There is nothing to prevent a Sudra from adopting a boy from a different gotra (*o*).

(3) *Adoption of married man.*—In Western India where the Mayukha is the prevailing authority, a Sudra may be adopted even after his marriage (*p*).

In other parts of British India, however, where the authority of the Dattaka Chandrika is supreme, such an adoption is invalid (*q*).

636. Second adoption during lifetime of first adopted son.—A second adoption of a son, the first adopted son being alive, and retaining the character of a son, is illegal (*r*).

637. Son born after adoption.—In the case of Sudras in the Madras Presidency (*s*) and Bengal (*t*), an adopted son on partition of the family property shares equally with a son or sons of the adoptive father born after the adoption.

Marriage.

638. Marriage as a samskara.—Among Sudras marriage is as much a *samskara* as among the twice-born classes. Therefore, a debt contracted for the marriage of a member of a joint Sudra family is a debt contracted for a family purpose and is binding on the joint family property (*u*).

In Hindu law marriage is regarded as one of the ten samskaras or sacraments necessary for regeneration of a man of the twice-born classes and the only sacrament for women and Sudras.

(*l*) *Raj Koomar* v. *Bissessur* (1884) 10 Cal. 688, *Lakshmappa* v. *Ramava* (1875) 12 Bom. H. C. 364; *Kalyandas* v. *Jivan* (1923) 25 Bom. L. R. 510, 73 I. C. 1023, ('23) A. B. 427; *Subrao* v. *Radha* (1928) 52 Bom. 497, 113 I. C. 497, ('28) A. B. 295.

(*m*) *Maharaja of Kolhapur* v. *Sundaram* (1925) 48 Mad. 1, 93 I. C. 705, ('25) A. M. 497.

(*n*) *Chinna* v. *Pedda* (1876) 1 Mad. 62.

(*o*) *Rungama* v. *Atchama* (1846) 4 M. I. A. 1.

(*p*) *Nathaji* v. *Hari* (1871) 8 Bom. H. C. A. C. 67; (1875) 12 Bom. H. C. 364, *supra*.

(*q*) *Lingayya Chetty* v. *Chengalammal* (1925) 48 Mad. 407, 89 I. C. 923, ('25) A. M. 272, *Somasekhara* v. *Mahadeva* (1930) 53 Mad. 297, 133 I. C. 744, ('30) A. M. 496; *Damodarn* v. *Collector of Banda* (1910) 7 All. L. J. 927, 7 I. C. 418.

(*r*) (1846) 4 M. I. A. 1, *supra*.

(*s*) *Perrazu* v. *Subbarayudu* (1921) 48 I. A. 280, 44 Mad. 656, 61 I. C. 690, ('22) A.PC. 71.

(*t*) *Asita Mohon* v. *Nirode Mohon* (1916) 20 C. W. N. 901, 35 I. C. 127, ('17) A C 292

(*u*) *Sundrabai* v. *Shivnarayana* (1908) 32 Bom. 81, *Kameswara* v. *Veeracharlu* (1911) 34 Mad. 422, 8 I. C. 195.

Ss. 638, 639

The daughter of a Sudra is entitled to be paid her marriage expenses out of the father's estate in the hands of her step-mother in the same way as she is entitled to be paid her maintenance; this rule applies as much to Sudras as to the twice-born classes (*v*).

639. Identity of caste.—It is a general principle of the Hindu law that a marriage between persons who do not belong to the same caste is invalid, unless it is sanctioned by custom. Therefore a marriage between a Thakur (Sudra) and a Brahmin woman is invalid (*w*). So also a marriage between a Sudra and a Vaishya woman. The offspring of such marriages are illegitimate (*x*). Marriages, however, between a Vaishya and a Kayestha (Sudra) woman are recognised by local custom in the District of Tipperah and are therefore valid (*y*).

But a marriage between persons belonging to different sub-divisions of the same caste is valid. It has accordingly been held that the following marriages are valid, they being marriages between persons belonging to different sub-divisions of the Sudra caste :—

(a) A marriage between a Zamindar of Malava caste with a woman of the Vellala class of Sudras (*z*).

(b) A marriage between a Kayestha of Bengal and a Dom woman (*a*).

(c) A marriage between a Kayestha of Bengal and a Tanti woman (*b*).

(d) A marriage between a Sudra and a Christian woman converted to Hinduism (*c*).

In the last mentioned case (*d*) it was held that such marriages were valid as they were common among and recognised as valid by the custom of the caste to which the man belonged. At the same time the opinion was expressed that such marriages were valid even under the Hindu law.

Lingayats of Bombay Presidency.—According to the Lingayat religion, as well as according to Hindu law, marriages between members of different classes of Lingayats are not illegal (*e*).

(*v*) *Bapayya* v. *Rukhamma* (1909) 19 Mad. L. J. 666, 4 I. C. 1069.

(*w*) *Sespuri* v. *Dwarka Prasad* (1912) 10 All. L. J. 181, 16 I. C. 222.

(*x*) *Munni Lal* v. *Shiamy* (1926) 48 All. 670, 97 I. C. 347, ('26) A. A. 656.

(*y*) *Ram Lal* v. *Akhoy Charan* (1903) 7 C. W. N. 619.

(*z*) *Ramamani Ammal* v. *Kulanthai* (1871) 14 M.I.A. 346; *Inderum* v. *Ramasuamy* (1869) 13 M.I.A. 141; *Upoma* v. *Bholaram* (1888) 15 Cal. 708.

(*a*) *Bhola Nath* v. *Emperor* (1924) 51 Cal. 488, 81 I. C. 709, ('24) A. C. 616.

(*b*) *Biswanath Das* v. *Shorashibala* (1921) 48 Cal. 926, 66 I. C. 590, ('21) A. C. 48.

(*c*) *Muthusami* v. *Masilamani* (1910) 33 Mad. 342, 5 I. C. 42.

(*d*) (1910) 33 Mad. 342, 5 I. C. 42, *supra*.

(*e*) *Fakirgauda* v. *Gangi* (1898) 22 Bom. 277.

640. Anuloma marriage.—Under the Hindu law as administered in the Bombay Presidency, a marriage between a Vaishya male and a Sudra female is an *anuloma* marriage and is valid (*f*). So also the marriage of a Brahman male with a Sudra female (*g*).

641. Presumption as to form of marriage.—It has been held in Bombay that even among Sudras the law will presume the marriage to have been according to the approved form if the parties belonged to a respectable family (*h*).

Inheritance and Partition.

642. Inheritance and partition.—The texts of the Mitakshara bearing on the subject are contained in chap. I, sec. 12, paras. 1 and 2 :—

> "1. The author next delivers a special rule concerning the partition of a Sudra's goods. Even a son begotten by a Sudra on a female slave, may take a share by the father's choice. But if the father be dead, the brethren should make him partaker of the moiety of a share; and one, who has no brothers, may inherit the whole property, in default of daughter's sons" (*i*).
>
> "The son, begotten by a Sudra on a female slave, obtains a share by the father's choice, or at his pleasure. But, after (the demise of) the father, if there be son of a wedded wife, let these brothers allow the son of the female slave to participate for half a share: that is, let them give him (as much as is the amount of one brother's) allotment. However, should there be no sons of a wedded wife, the son of the female slave takes the whole estate, provided there be no daughters of a wife nor sons of daughters. But if, there be such, the son of the female slave participates for half a share only."

The whole law on the subject of inheritance is dealt with in sec. 43, Nos. 1—3, note (4), and of partition in sec. 312.

Maintenance.

643. Maintenance of illegitimate sons.—The whole law on the subject of maintenance of the illegitimate sons of a Sudra by a dasi is dealt with in sec. 551 above.

(*f*) *Bai Gulab* v. *Jiwanlal* (1922) 46 Bom. 871, 65 I. C. 603, ('22) A. B 32.

(*g*) *Natha* v. *Mehta Chotalal* (1931) 55 Bom. 1, 130 I. C. 17, ('31) A. B. 89.

(*h*) *Jagannath* v. *Narayan* (1910) 34 Bom. 553, 7 I. C. 459.

(*i*) Yajnyavalkya, 2, 134-135.

APPENDIX I.

THE HINDU TRANSFERS AND BEQUESTS ACT, 1914.

BEING

MADRAS ACT NO. I OF 1914.

[*Came into force on the* 14*th February*, 1914.]

An Act to declare the rights of Hindus to make transfers and bequests in favour of unborn persons [in the Mufassal of Madras].

Preamble.

WHEREAS it is expedient to declare the rights of persons governed by the Hindu law to make transfers and bequests in favour of unborn persons; It is hereby enacted as follows:—

Short title.

1. This Act may be called "The Hindu Transfers and Bequests Act, 1914."

Application and extent.

2. (*1*) This Act shall apply to all transfers *inter vivos* and wills made by persons governed by the Hindu law who are domiciled within the limits of the Presidency of Madras.

(*2*) In the case of transfers *inter vivos* or wills executed before the date of this Act the provisions of this Act shall apply to such of the dispositions thereby made as are intended to come into operation at a time which is subsequent to such date: Provided that nothing contained in this section shall affect *bona fide* transferees for valuable consideration in whom the right to any property has vested prior to the date of the Act.

Explanation.—Hindus governed by the Marumakkattayam or the Aliyasantana law shall be deemed to be persons governed by the Hindu law for the purposes of this Act.

3. Subject to the limitations and provisions specified in this Act, no disposition of property by a Hindu, whether by transfer *inter vivos* or by will, shall be invalid by reason only that any person for whose benefit it may have been made was not born at the date of such disposition.

4. The limitations and provisions referred to in section 3 shall be the following, namely :—

(*a*) in respect of dispositions by transfers *inter vivos*, those contained in Chapter II of the Transfer of Property Act, 1882, and

(*b*) in respect of disposition by will, those contained in sections 113, 114, 115 and 116 of the Indian Succession Act, 1925.

Secs. 3 and 4 were substituted for the original secs. 3, 4 and 5, by the Transfer of Property (Amendment) Supplementary Act 21 of 1929, sec. 11, which came into force on the 1st April 1930. The original secs. 3, 4 and 5 were as follows :—

Transfers and bequests in favour of unborn persons.

3. A transfer *inter vivos* or disposition by will of any property shall not be invalid by reason only that the transferee or legatee is an unborn person at the date of the transfer or the death of the testator, as the case may be.

Rule against perpetuity in regard to transfers.

4. No transfer of property can operate to create an interest which is to take effect after the lifetime of one or more persons living at the date of the transfer and the minority of some persons who shall be in existence at the expiration of that period and to whom, he attains full age, the interest created is to belong

This is sec. 14 of the Transfer of Property Act 1882.

Rule against perpetuity in regard to bequests.

5. No bequest is valid whereby the vesting of the thing bequeathed may be delayed beyond the lifetime of one or more persons living at the testator's decease and the minority of some person who shall be in existence at the expiration of that period and to whom, if he attains full age, the thing bequeathed is to belong.

This is sec. 101 *of the Indian Succession Act,* 1865, *now sec.* 114 *of the Indian Succession Act*, 1925.

Note.—The Act in the unamended form still applies to transactions before April 1930. (*Vide* s. 15 of Act xxi of 1929).

APPENDIX II.

THE HINDU DISPOSITION OF PROPERTY ACT, 1916,

BEING

ACT NO. XV OF 1916.

[*Received the assent of the Governor-General on the 28th September* 1916.]

An Act to remove certain existing disabilities in respect of the power of disposition of property by Hindus for the benefit of persons not in existence at the date of such disposition.

WHEREAS it is expedient to remove certain existing disabilities in respect of the power of disposition of property by Hindus for the benefit of persons not in existence at the date of such disposition; It is hereby enacted as follows:—

Short title and extent.

1. (*1*) This Act may be called the Hindu Disposition of Property Act, 1916.

(*2*) It extends, in the first instance to the whole of British India, *except the province of Madras:* Provided that the Governor-General in Council may, by notification in the Gazette of India, extend this Act to the province of Madras.

As to Madras, see App. I and App. III.

Dispositions for the benefit of person not in existence.

2. Subject to the limitations and provisions specified in this Act, no disposition of property by a Hindu, whether by transfer *inter vivos* or by will, shall be invalid by reason only that any person for whose benefit it may have been made was not in existence at the date of such disposition.

Limitations and conditions.

3. The limitations and provisions referred to in section 2 shall be the following namely:—

(*a*) in respect of dispositions by transfer *inter vivos* those contained in Chapter II of the Transfer of Property Act, 1882, and

"Chapter II" was substituted for "sections 13, 14 and 20," by the Transfer of Property (Amendment) Supplementary Act 21 of 1929, sec. 12, which came into force on the 1st April, 1930.

(b) in respect of dispositions by will, those contained in sections 113, 114, 115 and 116 of the Indian Succession Act, 1925.

The words and figures "sections 113, 114, 115 and 116 of the Indian Succession Act, 1925," were substituted for the words and figures "sections 100 and 101 of the Indian Succession Act, 1865," by the Transfer of Property (Amendment) Supplementary Act 21 of 1929, sec. 12.

4. [*Omitted by the Transfer of Property (Amendment) Supplementary Act 21 of 1929, sec. 12.*]

The original sec. 4 was as follows :—

Failure of prior disposition.

4. Where a disposition of property fails by reason of any of the limitations referred to in section 3, any disposition intended to take effect after or upon failure of such prior disposition also fails.

Application of this Act to the Khoja community.

5. Where the Governor-General in Council is of opinion that the Khoja community in British India or any part thereof desire that the provisions of this Act should be extended to such community, he may, by notification in the Gazette of India, declare that the provisions of this Act, with the substitution of the word "Khojas" or "Khoja," as the case may be, for the word "Hindus" or "Hindu" wherever those words occur, shall apply to that community in such area as may be specified in the notification and this Act shall thereupon have effect accordingly.

Note.—The Act in the unamended form still applies to transactions before April 1930. (*Vide* s. 15 of Act xxi of 1929.)

APPENDIX III.

THE HINDU TRANSFERS AND BEQUESTS (CITY OF MADRAS) ACT.

BEING

ACT VIII OF 1921.

[*Received the assent of the Governor-General on the 27th March 1921.*]

An Act to declare the rights of Hindus to make transfers and bequests in favour of unborn persons in the City of Madras.

WHEREAS it is expedient to declare the rights of Hindus to make transfers and bequests in favour of unborn persons in the City of Madras; It is hereby enacted as follows :—

Short title.

1. This Act may be called the Hindu Transfers and Bequests (City of Madras) Act, 1921.

Application and extent.

2. (*1*) This Act shall apply to all transfers *inter vivos* and wills made by persons governed by the Hindu law who are domiciled within the limits of the Ordinary Original Civil Jurisdiction of the High Court of Madras.

(*2*) In the case of transfers *inter vivos* or wills executed before the date of this Act, the provisions of this Act shall apply to such of the dispositions thereby made as are intended to come into operation at a time which is subsequent to the 14th February 1914 :

Provided that nothing contained in this section shall affect *bona fide* transferees for valuable consideration in whom the right to any property has vested prior to the date of this Act.

Explanation.—Hindus governed by the Marumakkattayam or the Aliyasantana law shall be deemed to be persons governed by the Hindu law for the purposes of this Act.

3. Subject to the limitations and provisions specified in this Act, no disposition of property by a Hindu, whether by transfers *inter vivos* or by will, shall be invalid by reason

only that any person for whose benefit it may have been made was not born at the date of such disposition.

4. The limitations and provisions referred to in section 3 shall be the following, namely :—

(*a*) in respect of disposition by transfer *inter vivos*, those contained in Chapter II of the Transfer of Property Act, 1882, and

(*b*) in respect of dispositions by will, those contained in sections 113, 114, 115 and 116 of the Indian Succession Act, 1925.

Secs. 3 and 4 were substituted for the original secs. 3, 4 and 5, by the Transfer of Property (Amendment) Supplementary Act 21 of 1929, sec. 13 which came into force on the 1st April 1930. The original secs. 3, 4 and 5 were as follows :—

Transfers and bequests in favour of unborn persons.

3. A transfer *inter vivos* or disposition by will of any property shall not be invalid by reason only that the transferee or legatee is an unborn person at the date of the transfer or the death of the testator, as the case may be.

Rule against perpetuity in regard to transfers.

4. No transfer of property can operate to create an interest which is to take effect after the lifetime of one or more persons living at the date of the transfer, and the minority of some person who shall be in existence at the expiration of that period and to whom, if he attains full age, the interest created is to belong.

This is sec. 14 *of the Transfer of Property Act*, 1882.

Rule against perpetuity in regard to bequests.

5. No bequest is valid whereby the vesting of the thing bequeathed may be delayed beyond the lifetime of one or more persons living at the testator's decease and the minority of some persons who shall be in existence at the expiration of that period, and to whom, if he attains full age, the thing bequeathed is to belong.

This is sec. 101 *of the Indian Succession Act*, 1865, *now sec.* 114 *of the Indian Succession Act*, 1925.

Note.—The Act in the unamended form still applies to transactions before April 1930. (*Vide* s. 15 of Act xxi of 1929).

APPENDIX IV.

THE INDIAN LIMITATION (AMENDMENT) ACT I OF 1927.

[*Received the assent of the Governor-General on the* 18*th February* 1927.]

An Act further to amend the Indian Limitation Act, 1908, *for certain purposes.*

Section 3. To section 21 of the said Act the following sub-section shall be added, namely :—

" (3) for the purposes of the said sections [that is, sections 19 and 20]—

(*a*) an acknowledgment signed, or a payment (of interest, or part payment) made in respect of any liability, by, or by the duly authorised agent of, *any widow or other limited owner of property* who is governed by the Hindu law, shall be a valid acknowledgment or payment, as the case may be as against a reversioner, succeeding to such liability ; and

(*b*) where a liability has been incurred by, or on behalf of, a Hindu undivided family as such, an acknowledgment or payment (of interest, or part payment) made by, or by the duly authorised agent of, the *manager of the family* for the time being shall be deemed to have been made on behalf of the whole family."

APPENDIX V.

HINDU INHERITANCE (REMOVAL OF DISABILITIES) ACT, 1928.

ACT NO. XII OF 1928.

(Received the assent of the Governor-General on the 20th September 1928.)

An Act to amend the Hindu law relating to exclusion from inheritance of certain classes of heirs, and to remove certain doubts.

WHEREAS it is expedient to amend the Hindu law relating to exclusion from inheritance of certain classes of heirs, and to remove certain doubts ; It is hereby enacted as follows :—

Short title, extent and application.

1. *(1)* This Act may be called the *Hindu Inheritance (Removal of Disabilities) Act*, 1928.

(2) It extends to the whole of British India, including British Baluchistan and the Sonthal Parganas.

(3) It shall *not* apply to any person governed by the *Dayabhaya School of Hindu Law.*

Persons not to be excluded from inheritance or rights in joint-family property.

2. Notwithstanding any rule of Hindu law or custom to the contrary, no person governed by the Hindu law, other than a person who is and has been *from birth a lunatic or idiot*, shall be excluded from inheritance or from any right or share in joint-family property by reason only of any disease, deformity or physical or mental defect.

Saving and exception.

3. Nothing contained in this Act shall affect any *right* which has accrued or any *liability* which has been incurred before the commencement thereof, or shall be deemed to confer upon any person any right in respect of *any religious office or service or of the management of any religious or charitable trust* which he would not have had if this Act had not been passed.

Section not retrospective.—If any person suffering from any *physical* defect has before passing of the Act (20th September 1928) been already excluded from inheritance or from a share on partition, the Act does not entitle him to claim the inheritance or the share on partition.

APPENDIX VI.

THE INDIAN SUCCESSION (AMENDMENT) ACT XIV OF 1928.

[*Received the assent of the Governor-General on the* **22nd** *September* 1928.]

An Act further to amend the Indian Succession Act, 1925.

S. 2. After sub-section (2) of section 372 of the Indian Succession Act, 1925, the following sub-section shall be added, namely :—

"(3) Application for such a certificate may be made in respect of any debt or debts due to the deceased creditor *or in respect of portions thereof.*"

APPENDIX VII.

ACT NO. II OF 1929.

HINDU LAW OF INHERITANCE (AMENDMENT) ACT, 1929.

[*Received the assent of the Governor-General on the 21st February* 1929.]

An Act to alter the order in which certain heirs of a Hindu male dying intestate are entitled to succeed to his estate.

WHEREAS it is expedient to alter the order in which certain heirs of a Hindu male dying intestate are entitled to succeed to his estate : It is hereby enacted as follows :—

Short title, extent and application.

1. (*1*) This Act may be called the *Hindu Law of Inheritance* (*Amendment*) *Act*, 1929.

(*2*) It extends to the whole of British India, including British Baluchistan and the Sonthal Parganas, but it applies only to persons who, but for the passing of this Act, would have been subject to the law of *Mitakshara* in respect of the provisions herein enacted, *and* it applies to such persons in respect only of the property of males *not held in coparcenary and not disposed of by will.*

Order of succession of certain heirs.

2. A son's daughter, daughter's daughter, sister, and sister's son shall, in the order so specified, be entitled to rank in the order of succession next *after a father's father* and before a father's brother :

For decisions on the above section see sec. 13-13A to 13E of the text (pp. 44-46).

Provided that a *sister's son shall not include a son adopted after the sister's death.*

Savings.

3. Nothing in this Act shall—

(*a*) affect any special family or local custom having the force of law, or

(*b*) vest in a son's daughter, daughter's daughter or sister an *estate* larger than, or different in kind from, that possessed by a female in property inherited by her from a male according to the school of Mitakshara law by which the male was governed, or

(*c*) enable more than one person to succeed by inheritance to the estate of a deceased Hindu male which by a customary or other rule of succession descends to a *single heir*.

It is observed by the Madras High Court that this legislation is defective in that it does not bring in son's daughter's son, daughter's son's son, daughter's daughter's son in sec. 2 and place them somewhere before sister's son. A preference for one's own descendants to collaterals is in consonance not only with Indian sentiment but with most systems of law (*j*). In the actual case, no injustice resulted because the case arose before the Act.

(*j*) *Kalimuthu* v. *Ammamuthu* (1935) 58 Mad. 238, 153 I. C. 107, ('34) A. M. 611.

APPENDIX VIII.

ACT NO. XVIII OF 1929.

INDIAN SUCCESSION (AMENDMENT) ACT, 1929.

(Received the assent of the Governor-General on the 1st October 1929.)

An Act further to amend the Indian Succession Act, 1925, for certain purposes.

WHEREAS it is expedient further to amend the Indian Succession Act, 1925, for the purposes hereinafter appearing; It is hereby enacted as follows:—

Short title.

1. This Act may be called the Indian Succession (Amendment) Act, 1929.

Amendment of section 2, Act XXXIX of 1925.

2. After clause (*b*) of section 2 of the Indian Succession Act, 1925 (hereinafter referred to as the said Act), the following clause shall be inserted, namely:—

"(*bb*) 'District Judge' means the Judge of a principal Civil Court of original jurisdiction".

Amendment of section 57, Act XXXIX of 1925.

3. (*1*) Sub-section (1) of section 57 of the said Act shall be renumbered as section 57, and after clause (*b*) and before the proviso the word "and" and the following clause shall be added, namely:—

"(*c*) to all wills and codicils made by any Hindu, Buddhist, Sikh, or Jaina on or after the first day of January, 1927, to which those provisions are not applied by clauses (*a*) and (*b*)".

(*2*) Sub-section (*2*) of section 57 of the said Act shall be omitted.

Amendment of section 213, Act XXXIX of 1925.

4. In sub-section (*2*) of section 213 of the said Act, for the word "class" the word "*classes*" and for the words and figures "sub-section (1) of section 57" the words, letters and figures "clauses (*a*) and (*b*) of section 57" shall be substituted.

Repeals.

5. The enactments specified in the Schedule are hereby repealed.

THE SCHEDULE.

ENACTMENTS REPEALED.

(See section 5.)

Year.	No.	Short title.
1926	XXXVII	The Indian Succession (Amendment) Act, 1926.
1928	XXI	The Indian Succession (Second Amendment) Act, 1928.

APPENDIX IX.

ACT NO. XIX OF 1929.

AS AMENDED BY ACTS VII AND XIX OF 1938.

CHILD MARRIAGE RESTRAINT ACT, 1928, AMENDED BY VII AND XIX OF 1938.

(*Received the assent of the Governor-General on the* 1st *October* 1929.)
An Act to Restrain the Solemnisation of Child Marriages.

WHEREAS it is expedient to restrain the solemnisation of child marriages; It is hereby enacted as follows:—

Short title, extent and commencement.

1. (*1*) This Act may be called the *Child Marriage Restraint Act*, 1928.

(*2*) It extends to the whole of British India, including British Baluchistan and the Sonthal Parganas and applies also to

(*a*) all British subjects and servants of the Crown in any part of India; and

(*b*) all British subjects who are domiciled in any part of India wherever they may be.

(*3*) It shall come into force on the *1st day of April*, 1930.

Definition.

2. In this Act, unless there is anything repugnant in the subject or context,—

(*a*) "child" means a person who, if a male, is under eighteen years of age, and if a female, is under fourteen years of age;

(*b*) "child marriage" means a marriage to which either of the contracting parties is a child;

(*c*) "contracting party" to a marriage means either of the parties whose marriage is or is about to be thereby solemnised; and

(*d*) "minor" means a person of either sex who is under eighteen years of age.

Punishment for male adult below twenty-one years of age marrying a child.

3. Whoever, being a *male* above *eighteen* years of age and below twenty-one, contracts *a child marriage* shall be punishable with fine which may extend to one thousand rupees.

Punishment for male adult above twenty-one years of age marrying a child.

4. Whoever, being a *male* above *twenty-one* years of age, contracts a *child marriage* shall be punishable with simple imprisonment which may extend to one month, or with fine which may extend to one thousand rupees, or with both.

Punishment for solemnising a child marriage.

5. Whoever performs, conducts or directs any child marriage shall be punishable with simple imprisonment which may extend to one month, or with fine which may extend to one thousand rupees, or with both, unless he proves that he has reason to believe that the marriage was not a child marriage.

Punishment for parent or guardian concerned in a child marriage.

6. *(1)* Where a minor contracts a child marriage, any person having charge of the minor, whether as parent or guardian or in any other capacity, lawful or unlawful, who does any act to promote the marriage or permits it to be solemnised, or negligently fails to prevent it from being solemnised, shall be punishable with simple imprisonment which may extend to one month, or with fine which may extend to one thousand rupees, or with both :

Provided that no woman shall be punishable with imprisonment.

See *Ram Josh Agarwala* v. *Chand Mandal* (1937) 2 Cal. 764; *Public Prosecutor* v. *Rattayya* (1937) Mad. 854, 168 I.C. 723, ('37) A.M. 990; *Emperor* v. *Munshi Ram* (1936) 58 All. 102, 159 I.C. 1007, ('36) A. A. 11.

(2) For the purposes of this section, it shall be presumed, unless and until the contrary is proved, that where a minor has contracted a child marriage, the person having charge of such minor has negligently failed to prevent the marriage from being solemnised.

Imprisonment not to be awarded for offences under section 3

7. Notwithstanding anything contained in section 25 of the General Clauses Act, 1897, or section 64 of the Indian Penal Code, a Court sentencing an offender under section 3 shall not be competent to direct that, in default of payment of the fine imposed, he shall undergo any term of imprisonment.

APPENDIX X.

ACT NO. XXX OF 1930.

HINDU GAINS OF LEARNING ACT, 1930.

(*Received the assent of the Governor-General on the 25th July* 1930.)

An Act to remove doubt as to the rights of a member of a Hindu undivided family in property acquired by him by means of his learning.

WHEREAS it is expedient to remove doubt, and to provide an uniform rule, as to the rights of a member of a Hindu undivided family in property acquired by him by means of his learning; It is hereby enacted as follows:—

Short title and extent.

1. (*1*) This Act may be called the *Hindu Gains of Learning Act*, 1930.

(2) It extends to the whole of British India.

Definitions.

2. In this Act, unless there is anything repugnant in the subject or context,—

(*a*) "acquirer" means a member of a Hindu undivided family, who acquires *gains of learning*;

(*b*) "gains of learning" means all acquisitions of property made substantially by means of learning, whether such acquisitions be made before or after the commencement of this Act and whether such acquisitions be the ordinary or the extraordinary result of such learning; and

(*c*) "learning" means education, whether elementary, technical, scientific, special or general, and training of every kind which is usually intended to enable a person to pursue any trade, industry, profession or avocation in life.

Gains of learning not to be held not to be the separate property of acquirer merely for certain reasons.

3. Notwithstanding any custom, rule or interpretation of the Hindu Law, no gains of learning shall be held not to be the exclusive and separate property of the acquirer merely by reason of—

(*a*) his learning having been, in whole or in part, imparted to him by any member living or deceased, of his family, or with the aid of the joint funds of his family or with the aid of the funds of any member thereof, or

(*b*) himself or his family having, while he was acquiring his learning, been maintained or supported, wholly or in part, by the joint funds of his family, or by the funds of any member thereof.

Savings.

4. This Act *shall not be deemed in any way to affect* -

(*a*) the terms or incidents of any transfer of property *made or effected before the commencement of this Act,*

(*b*) the validity, invalidity, effect or consequences of anything already suffered or done *before the commencement of this Act.*

(*c*) any right or liability created under a partition, or an agreement for a partition, of joint family property made before the *commencement of this Act*, or

(*d*) Any remedy or proceeding in respect of such right or liability;

or to render invalid or in any way affect anything done before the commencement of this Act in any proceeding pending in a Court at such commencement; and any such remedy and any such proceeding as is herein referred to may be enforced, instituted or continued; as the case may be, as if this Act had not been passed.

APPENDIX XI.

INDIA ACT NO. XVIII OF 1937 AS AMENDED BY ACT XI OF 1938.

THE HINDU WOMEN'S RIGHTS TO PROPERTY ACT, 1937.

WHEREAS it is expedient to amend the Hindu Law to give better rights to women in respect of property :—

It is hereby enacted as follows :—

Short title and extent. (1) This Act may be called The Hindu Women's Rights to Property Act, 1937.

(2) It extends to the whole of British India, including British Baluchistan and the Sonthal Parganas but excluding Burma.

Application. 2. Notwithstanding any rule of Hindu Law or custom to the contrary, the provisions of section 3 shall apply where a Hindu dies intestate.

Devolution of property. 3. (*1*) When a Hindu governed by the Dayabhaga School of Hindu law dies intestate leaving any property, and when a Hindu governed by any other school of Hindu law or by customary law dies intestate leaving separate property, his widow, or if there is more than one widow all his widows together, shall, subject to the provisions of sub-section (*3*), be entitled in respect of property in respect of which he dies intestate to the same share as a son :

Provided that the widow of a predeceased son shall inherit in like manner as a son if there is no son surviving of such predeceased son, and shall inherit in like manner as a son's son if there is surviving a son or son's son of such predeceased son ;

Provided further that the same provision shall apply mutatis mutandis to the widow of a predeceased son of a predeceased son.

(*2*) When a Hindu governed by any school of Hindu law other than the Dayabhaga school or by customary law dies having at the time of his death an interest in a Hindu joint family property, his widow shall, subject to the provisions of sub-section (*3*), have in the property the same interest as he himself had.

(*3*) Any interest devolving on a Hindu widow under the provisions of this section shall be the limited interest known as a Hindu Woman's estate, provided however that she shall have the same right of claiming partition as a male owner.

(*4*) The provisions of this section shall not apply to an estate which by a customary or other rule of succession or by the terms of the grant applicable thereto descends of a single heir or to any property to which the Indian Succession Act, 1925, applies.

For decisions on the above section see s. 35 of the text.

Savings. 4. Nothing in this Act shall apply to the property of any Hindu dying intestate before the commencement of this Act.

Meaning of the expression "die intestate." 5. For the purposes of this Act, a person shall be deemed to die intestate in respect of all property of which he has not made a testamentary disposition which is capable of taking effect.

APPENDIX XII.

ACT NO. XIX OF 1937.

ARYA MARRIAGE VALIDATION ACT.

An Act to recognise and remove doubts as to the validity of inter-marriages current among Arya Samajists.

WHEREAS it is expedient to recognise and place beyond doubt the validity of inter-marriages of a class of Hindus known as Arya Samajists ; It is hereby enacted as follows :—

Short title and extent.

1. (*1*) This Act may be called the Arya Marriage Validation Act, 1937.

(*2*) It extends to the whole of British India including British Baluchistan and the Sonthal Parganas, and applies also to all subjects of His Majesty within other parts of India, and to all Indian subjects of His Majesty without and beyond British India.

Marriage between Arya Samajists not to be invalid.

2. Notwithstanding any provision of Hindu law, usage or custom to the contrary no marriage contracted whether before or after the commencement of this Act between two persons being at the time of the marriage Arya Samajists shall be invalid or shall be deemed ever to have been invalid by reason only of the fact that the parties at any time belonged to different castes or different sub-castes of Hindus or that either or both of the parties at any time before the marriage belonged to a religion other than Hinduism.

APPENDIX XIII.

GOVERNMENT OF INDIA.

LEGISLATIVE DEPARTMENT.

New Delhi, the 4th May 1946.

The following Act of the Indian Legislature received the assent of the Governor-General on the 23rd April, 1946.

ACT XIX OF 1946.

An Act to give Hindu married women a right to separate residence and maintenance under certain circumstances.

WHEREAS it is expedient to provide for the right to separate residence and maintenance under certain circumstances in the case of Hindu married women;

It is hereby enacted as follows:—

1. *Short title and extent.*—(1) This Act may be called the Hindu Married Women's Right to Separate Residence and Maintenance Act, 1946.

(2) It applies to the whole of British India.

2. *Grounds for claiming separate residence and maintenance.*—Notwithstanding any custom or law to the contrary a Hindu married woman shall be entitled to separate residence and maintenance from her husband on one or more of the following grounds, namely,—

(1) if he is suffering from any loathsome disease not contracted from her;

(2) if he is guilty of such cruelty towards her as renders it unsafe or undesirable for her to live with him;

(3) if he is guilty of desertion, that is to say, of abandoning her without her consent or against her wish;

(4) if he marries again;

(5) if he ceases to be a Hindu by conversion to another religion;

(6) if he keeps a concubine in the house or habitually resides with a concubine;

(7) for any other justifiable cause:

Provided that a Hindu married woman shall not be entitled to separate residence and maintenance from her husband if she is unchaste or ceases to be a Hindu by change to another religion or fails without sufficient cause to comply with a decree of a competent Court for the restitution of conjugal rights.

3. *Amount of maintenance.*—When allowing a claim for separate residence and maintenance under section 2, the Court shall determine the amount to be paid by the husband to the wife therefor, and in so doing shall have regard to the social standing of the parties and the extent of the husband's means.

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